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APPENDIX.

In the Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-422.

LAKE CARRIERS' ASSOCIATION, *et al.*,

Appellants,

v.

RALPH A. MacMULLAN, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN.

Filed September 23, 1971.
Probable Jurisdiction Noted December 7, 1971.

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APPENDIX.

DOCKET ENTRIES.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION.

1971

Mar. 16. Complaint and exhibits, filed.

Mar. 16. Motion for temporary restraining order and preliminary injunction, filed.

Mar. 16. Hearing had in chambers on temporary restraining order—order issued.

Mar. 16. Temporary restraining order, filed and entered.

Mar. 17. Bond on temporary restraining order in $5,000.00, filed. Aetna Casualty and Surety Co., surety.

Mar. 19. Notice of hearing for Apr. 19/71, on injunction, filed.

Mar. 19. Proof of mailing filed.

Mar. 22. Designation of Judges George Edwards of CCA, Ralph M. Freeman and Philip Pratt to serve as members of the Court to hear and determine this action, filed.

Mar. 26. Order extending temporary restraining order, filed and entered.

Mar. 30. Marshal's return, filed.

Mar. 30. Order granting application of Dominion Marine Association for leave to file brief as amicus curiae, filed and entered.

Apr. 5. Defts' motion to dismiss, or in the alternative for abstention and brief, with proof of service, filed. Hearing Apr. 19/71.

Apr. 7. Application and order granting leave to file amicus curiae brief on behalf of the Seafarers International Union of North America Great Lakes District, AFL-CIO and Maritime Trades Dept., AFL-CIO, filed and entered.

Apr. 8. Petition to intervene as amicus curiae on behalf of defts. herein, with certificate of service, filed.

Apr. 12. Notice of taking of deposition of Eugene Jensen upon oral examination and affidavit of service, filed.

Apr. 14. Order extending temporary restraining order until determination of ptfs' application for interlocutory injunction, filed and entered.

Apr. 14. Notice of taking deposition and proof of service, filed.

Apr. 20. Deposition of Ralph Purdy, filed.

Apr. 20. Motion and order granting application of The American Institute of Merchant Shipping, et al. for leave to file brief as Amici Curiae, filed and entered. (brief attached)

Apr. 26. Answer to complaint for declaratory judgment and injunctive relief, filed.

Apr. 26. Petition to intervene as amicus curiae on behalf of deft. with certificate of service, filed. (dated Apr. 23/71)

Apr. 26. Order granting intervention as amicus curiae (International Union, United Auto Aerospace & Agricultural Implement Work of America, UAW) and to file brief, filed and entered.

Apr. 26. Ptfs' application for interlocutory injunction and defts' motion to dismiss heard—testimony taken—adj. to Apr. 27/71.

Apr. 26. Ptfs' application for interlocutory injunction and defts' motion to dismiss resumed—testimony taken—findings of fact and conclusions of law to be submitted in 7 days.

Apr. 28. Order of reassignment, filed and entered.

Apr. 29. Marshal's return, filed.

Apr. 30. Application and order granting leave to file amicus curiae brief on behalf of the Mich. State AFL-CIO and The Metropolitan Det. AFL-CIO, filed and entered.

Apr. 30. Deposition of Eugene Jensen, Rear Admiral, William F. Rea III, filed.

May 6. Transcript commencing Apr. 26/71, filed.

June 8. Stipulation of facts, filed. (dated Apr. 26/71)

June 8. Proposed conclusions of law, filed. (dated May 24/71)

July 12. Memorandum opinion dissolving temporary restraining order and dismissing complaint without prejudice, filed and entered.

July 29. Ptfs notice of appeal (CCA) filed.

July 29. Letter re: appeal filed.

July 29. Ptfs notice of appeal (U.S. Supreme Court) filed.

July 29. Proof of mailing filed.

July 29. Motion of ptf for injunction pending appeal with service, filed.

Aug. 27. Motion of ptfs for extension of time for transmission of record, with proof of service, filed.

Sept. 1. Notice of mailing file to CCA filed.

Sept. 17. Opinion and order denying ptfs' motion, filed and entered.

Sept. 17. Proof of mailing, filed.

Sept. 17. Notice of hearing on motion re extension of time for transmission of record to Sixth Circuit Court of Appeals for Sept. 27/71, with proof of service, filed.

Sept. 27. Order extending time to transmit record until Oct. 27/71, filed and entered.

Civil Action No. 36194.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

LAKE CARRIERS' ASSOCIATION,
a corporation,
1411 Rockefeller Building,
Cleveland, Ohio 44113
and
Certain of its member companies,
individually, namely,

AMERICAN STEAMSHIP COMPANY, INC.,
a corporation,
1016 Marine Trust Building,
Buffalo, New York 14203

AMERSAND STEAMSHIP CORPORATION,
a corporation,
1016 Marine Trust Building,
Buffalo, New York 14203

THE REISS STEAMSHIP COMPANY,
a corporation,
2300 Terminal Tower Building,
Cleveland, Ohio 44113

GARTLAND STEAMSHIP COMPANY,
a corporation,
2300 Terminal Tower Building,
Cleveland, Ohio 44113

GREAT LAKES STEAMSHIP DIVISION,
Bethlehem Steel Corporation,
a corporation,
2600 Terminal Tower Building,
Cleveland, Ohio 44113

CLEVELAND-CLIFFS STEAMSHIP CO.,
a corporation,
1460 Union Commerce Building,
Cleveland, Ohio 44115

CLEVELAND TANKERS, INC.,
a corporation,
P. O. Box 6479,
Cleveland, Ohio 44101

ERIE SAND STEAMSHIP COMPANY,
a corporation,
Foot of Sassafras Street,
Erie, Pennsylvania 16512

THE HANNA MINING CO.,
a corporation,
100 Erieview Plaza,
Cleveland, Ohio 44114

HURON PORTLAND CEMENT DIVISION,
National Gypsum Company,
a corporation,
Ford Street,
Alpena, Michigan 49707

INLAND STEEL COMPANY,
a corporation,
30 West Monroe Street,
Chicago, Illinois 60603

THE INTERLAKE STEAMSHIP CO.,
Division of Pickands Mather & Co.,
a corporation,
2000 Union Commerce Building,
Cleveland, Ohio 44115

KINSMAN MARINE TRANSIT COMPANY,
a corporation,
1548 Rockefeller Building,
Cleveland, Ohio 44113

MEDUSA PORTLAND CEMENT COMPANY,
a corporation,
P. O. Box 5668,
Cleveland, Ohio 44101

COLUMBIA TRANSPORTATION DIVISION,
Oglebay Norton Company,
a corporation,
1200 Hanna Building,
Cleveland, Ohio 44115

LAKE FLEET DIVISION,
Republic Steel Corporation,
a corporation,
55 Public Square,
Cleveland, Ohio 44113

TOMLINSON FLEET CORPORATION,
a corporation,
2900 Terminal Tower Building,
Cleveland, Ohio 44113

GREAT LAKES FLEET,
United States Steel Corporation,
a corporation,
1600 Rockefeller Building,
Cleveland, Ohio 44113

WILSON MARINE TRANSIT COMPANY,
Division of Litton Systems, Inc.,
a corporation,
55 Public Square,
Cleveland, Ohio 44113

Plaintiffs,

vs.

RALPH A. MacMULLAN, Individually and as Director, Michigan Department of Natural Resources,
Stevens T. Mason Building,
Lansing, Michigan 48926

FRANK J. KELLY, Individually, and as Attorney General for the State of Michigan,
State Capitol,
Lansing, Michigan

RALPH W. PURDY, Individually and as Executive Secretary, Water Resources Commission,
Stevens T. Mason Building,
Lansing, Michigan 48926

MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND THE MICHIGAN WATER RESOURCES COMMISSION,
Stevens T. Mason Building,
Lansing, Michigan 48926

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF.

(Filed March 16, 1971.)

Plaintiffs say:

1. This is an action for a declaratory judgment as authorized by Sec. 2201 of Title 28 of the United States Code and for injunctive relief as authorized by Secs. 2281 and 2284 of Title 28 of the United States Code, and is brought because there is an actual controversy now existing between the parties to the above-entitled action as to the standards of performance for marine sanitation devices applicable to federally licensed commercial, bulk cargo, vessels plying the waters of the Great Lakes, and the time frame within which such standards must be met, as to which matters plaintiffs seek the judgment of this Court.

2. Jurisdiction is grounded on Secs. 1331, 1333, 1337, 2201, 2281 and 2284 of Title 28 of the United States Code; the Federal Water Pollution Control Act as amended by the Water Quality Improvement Act of 1970, 33 U.S.C. Sec. 1151, et seq.; the Steamboat Inspection Acts of February 28, 1871 and May 27, 1936, 46 U.S.C. Sec. 361, et

seq.; the Boundary Waters Treaty of 1909 between the United States and Canada, 36 Stat. 2448, Treaty Series No. 548; and Article 1 Sec. 8, cl. 3; Article 3 Sec. 2, cl. 1; Article 6, cl. 2, Amendment XIV Sec. 1 of the Constitution of the United States.

3. The amount in controversy exceeds $10,000, exclusive of interests and costs.

4. Plaintiff Lake Carriers' Association is an organization incorporated under the laws of the State of Ohio with its principal place of business in Cleveland, Ohio. The membership of Lake Carriers' Association consists of 21 separate vessel companies, of which 19 are the individual plaintiffs named herein. The vessels enrolled in the Lake Carriers' Association account for more than 98 per cent of the total trip-carrying capacity of the United States commercial, bulk cargo, Great Lakes fleet.

5. Collectively, plaintiffs, other than Lake Carriers' Association, are the individual owners and/or operators of 187 American flag Great Lakes bulk cargo vessels, all of which are federally enrolled and licensed for employment in the coasting and foreign trade on the waters of the northern, northeastern and northwestern frontiers, otherwise than by sea, pursuant to the Act of February 27, 1877, c 69, Sec. 1; 46 U.S.C. Sec. 258. As federally licensed vessels navigating waters of the United States which are common highways of commerce, plaintiffs' vessels are subject to the provisions and regulations of the federal vessel inspection laws administered by the United States Coast Guard, the same being Title 52 of the Revised Statutes, 46 U.S.C. Sec. 361, et seq.

6. Article I of the Boundary Waters Treaty of 1909 between the United States and Canada, 36 Stat. 2448, Treaty Series No. 548, declares that the waters of the Great Lakes, from main shore to main shore, including Lake Michigan, shall forever continue free and open for the purposes of commerce and navigation to the inhabitants and to the ships, vessels and ports of both countries equally, and said Treaty prohibits enactment of any laws

or regulations inconsistent with such privilege of free navigation.

7. Plaintiffs, other than Lake Carriers' Association, are engaged in the business of providing vessel transportation, some for their own account and some for the account of others or both, throughout the entire Great Lakes-St. Lawrence Seaway Systems, serving in interstate and/or foreign commerce a variety of ports in the states of Minnesota, Wisconsin, Illinois, Indiana, Michigan, Ohio, Pennsylvania, New York; and the Provinces of Ontario and Quebec, Canada. The principal commodities transported by plaintiffs are iron ore, from ports on Lake Superior to ports on lower Lake Michigan, the Lower Detroit River and Lake Erie; coal, from ports on Lake Erie and lower Lake Michigan to ports in Michigan, Wisconsin, Minnesota and the Province of Ontario, metallurgical and chemical grade limestones, from Michigan ports on Lakes Huron and Michigan to ports on lower Lake Michigan and Lake Erie; grain, from the head of the Lakes to ports on the Lower Detroit River and Lake Erie. There are also lesser movements of petroleum, gypsum, gravel, sand, cement, coke, pig iron scrap, and finished and semi-finished steel products, involving a variety of ports in different states. All such movements involve the performance of a transportation service by federally licensed vessels in interstate commerce over the navigable waters of the United States and sometimes Canada. In performing such interstate transportation services, it is almost inevitable, with only a few minor exceptions, for plaintiffs' vessels to transit the navigable waters of the United States which are also the territorial waters of Michigan. Even where a commodity movement occurs between two or more Michigan ports, in most instances it constitutes interstate or foreign commerce in that the vessel at some point in its round trip voyage must pass through the territorial waters of another state or one of the Provinces of Canada. In all, the total bulk commodity movement for the Great Lakes last year was 223,404,329 net tons.

8. Plaintiffs, as the principal users of the Great Lakes for navigational purposes, are extremely interested in "clean water" and preservation of the ecology of the Great Lakes, not only because such is in the national interest, but also because plaintiffs' vessels utilize these waters as their principal source of potable water as well as boiler water. Plaintiffs are desirous, within the limits of available technology and of protecting the water quality of the Great Lakes through the installation on their vessels of marine sanitation devices consistent with maritime health and safety, and the marine and navigation laws and regulations, applicable to federally licensed vessels. Even in the absence of any standards of performance for marine sanitation devices, but anticipating that requirements would be similar to those of shore-side facilities, many of the plaintiffs have voluntarily undertaken a program of installing on their vessels marine sanitation devices which produce an effluent equivalent to municipal secondary waste treatment systems. Plaintiffs have been discouraged from continuing this program, however, because of enactment of a proliferation of state and municipal laws throughout the Great Lakes imposing differing requirements despite the amendments to the Federal Water Pollution Control Act, enacted April 3, 1970, specifically dealing with the control of sewage from vessels utilizing the navigable waters of the United States, 33 U.S.C. Sec. 1151, et seq. Confronted with a multiplicity of conflicting state, municipal and federal laws and regulations imposing a variety of vague, uncertain and differing requirements with respect to the standards of performance for marine sanitation devices, plaintiffs bring this action for declaratory judgment and injunctive relief to determine the constitutional validity as applied to federally licensed vessels of the Michigan Watercraft Pollution Control Act of 1970, the same being Act 167, Public Acts of 1970, State of Michigan.

9. Defendant Ralph A. MacMullan is the duly appointed, qualified and acting Director of the Michigan Department of Natural Resources with official residence

in Lansing, Michigan. Under and by virtue of Act 167, Public Acts of 1970, State of Michigan, commonly known as the Watercraft Pollution Control Act of 1970, the Water Resources Commission of the Michigan Department of Natural Resources is charged with the enforcement of the provisions of said Act. Defendant Ralph W. Purdy; with official residence in Lansing, Michigan, is the duly appointed, qualified and acting head and in charge of the Michigan Water Resources Commission and exercises supervision and control of the individuals employed by the Water Resources Commission now engaged in enforcing the aforesaid Act. Defendant Frank Kelly is the duly elected, qualified and acting Attorney General of the State of Michigan with official residence in Lansing, Michigan, whose duty it is or may become to prosecute the plaintiffs for violations of the aforesaid Act, a copy of which is attached hereto and marked Exhibit "A."

10. Sections 3, 4 and 8 of the aforesaid Watercraft Pollution Control Act of 1970 in particular attempt to regulate, direct and control the disposal of sanitary wastes from federally licensed vessels while in Michigan waters in that such sections provide inter alia:

> "Sec. 3 (2) It is unlawful to discharge, dump, throw or deposit garbage, litter, sewage or oil from a recreational, domestic or foreign watercraft used for pleasure or for the purpose of carrying passengers, cargo or otherwise engaged in commerce on the waters of this state."
>
> * * * * *
>
> "Sec. 4 (2) A person owning, operating or otherwise concerned in the operation, navigation or management of a watercraft having a marine toilet shall not own, use or permit the use of such toilet on the waters of this state unless the toilet is equipped with one of the following pollution control devices:
>
> (a) A holding tank or self-contained marine toilet which will retain all sewage produced on the

watercraft for subsequent disposal at approved dockside or onshore collection and treatment facilities.

(b) An incinerating device which will reduce to ash all sewage produced on the watercraft. The ash shall be disposed of onshore in a manner which will preclude pollution."

* * * * *

"Sec. 8 . . . Commercial docks and wharfs designed for receiving and loading cargo and/or freight from commercial watercraft must furnish facilities, if determined necessary, as prescribed by the commission, to accommodate discharge of sewage from heads and galleys, and for deposit of litter, garbage, trash, or bilge waters from the watercraft which utilize the docks or wharfs."

11. Section 11 of the aforesaid Watercraft Pollution Control Act of 1970 provides that any person who violates any provision of the Act is guilty of a misdemeanor and shall be fined not more than $500. Since enactment of the aforesaid Watercraft Pollution Control Act of 1970, the Michigan Water Resources Commission has maintained a staff of enforcement officers who, at the direction of defendants herein, have threatened plaintiffs with indictments if they enter Michigan waters without the specific equipment required by Section 4 of the aforesaid Act; and plaintiffs, by such threats, are prevented from using and enjoying their own federally licensed property free from improper and unlawful molestations and interferences by the officials of the Water Resources Commission of the Michigan Department of Natural Resources in that compliance with the equipment provisions of Section 4 of the Watercraft Pollution Control Act of 1970 requires substantial alterations in the present vessels; that such alterations cannot possibly be accomplished by the opening of navigation which usually occurs on or about March 15; that plaintiffs will not be able to begin operations this year without violating some of the provisions of the Watercraft Pollution Control Act of 1970; that even were

plaintiffs able to so equip their vessels as to comply with Section 4 of said Act, which is a physical impossibility, there are to plaintiffs' knowledge no pump-out facilities in Michigan or elsewhere suitable for commercial vessels, and the Water Resources Commission has not promulgated any rules or regulations delineating what is an approved dockside or onshore collection treatment facility for commercial vessels, nor has it prescribed or determined as necessary the location and nature of the facilities commercial docks and wharves must furnish to accommodate the discharge of sewage from heads and galleys, all as required by Section 8 of the aforesaid Act.

12. In the early part of 1968, a conference was held pursuant to Section 10 of the Federal Water Pollution Control Act (33 U.S.C. Sec. 1160), among the states bordering Lake Michigan. As a result of that conference it was agreed, among the several states, that uniform rules and regulations should be adopted and that controlling the discharge of wastes from commercial vessels should be the responsibility of the Federal Government. Thereafter, on April 3, 1970, an Act of Congress was approved, commonly known as the Water Quality Improvement Act of 1970, PL 91-224, H. R. 4418, which Act amended the Federal Water Pollution Control Act, 33 U.S.C. Sec. 1151, et seq., by directing inter alia in Section 13 (33 U.S.C. Sec. 1163) thereof:

> "(b) (1) As soon as possible after enactment of this section . . . the Secretary . . . after giving appropriate consideration to the economic costs involved, and within the limits of available technology, shall promulgate Federal standards of performance for marine sanitation devices . . . which shall be designed to prevent the discharge of untreated or inadequately treated sewage into or upon the navigable waters of the United States . . ." "* * * the Secretary of the Department in which the Coast Guard is operating shall promulgate regulations, which are consistent with standards promulgated under this subsection and with maritime safety and

the marine and navigation laws and regulations, governing the design, construction, installation, and operation of any marine sanitation device onboard such vessels."

"(2) Any existing vessel equipped with a marine sanitation device on the date of promulgation of initial standards and regulations under this section, which device is in compliance with such initial standards and regulations, shall be deemed in compliance with this section * * *."

"(c)(1) Initial standards and regulations under this section shall become effective for new vessels two years after promulgation and for existing vessels five years after promulgation."

"(f) * * * After the effective date of initial standards and regulations promulgated under this section, no state or political subdivision thereof shall adopt or enforce any statute or regulation of such state or political subdivision with respect to the design, manufacture, or installation or use of any marine sanitation device on any vessel subject to the provisions of this section. Upon application by a state, and where the Secretary determines that any applicable water quality standards require such a prohibition, he shall by regulation completely prohibit the discharge from a vessel of any sewage (whether treated or not) into those waters of such state which are the subject of the application and to which such standards apply."

13. The Report of the Committee on Public Works of the United States Senate (Report No. 91-351, 91st Congress, 1st Session), accompanying S. 7, the companion Bill of H. R. 4148, which ultimately became the Water Quality Improvement Act of 1970, states at page 11, "The Committee intends that this new section will assist in preventing at the earliest possible time permitted by existing and advancing technology, economics, and other practical considerations, the discharge into the navigable

waters of the United States of raw or inadequately treated sewage from vessels." Added the Committee at page 11:

> "The general enforcement authority to accomplish this section has been vested in the department in which the Coast Guard is operating. This was done because of the similarity to other Coast Guard functions and the expertise of the Coast Guard in marine engineering. In order to insure adequate recognition of marine safety and other transportation aspects, the Secretary of the Department in which the Coast Guard is operating has been designated to develop and promulgate the regulations which pertain to the design, installation, and operation of marine sanitation devices and further to certify these devices as complying with such regulation standards. These regulations must also assure compliance with the standards of performance issued by the Secretary. It is the committee's intention that there be close cooperation and coordination between the Secretary and the Secretary of the Department in which the Coast Guard is operating in the development of the overall program."

Then stated the Committee, inter alia, at page 12, "The Committee recognizes that many states have moved to control inadequately treated or untreated waste discharges from vessels and lauds the efforts of those states. However, conflicting regulations and standards relative to marine sanitation devices present * * * potentially serious restrictions on interstate movement of commercial vessels." In order to avoid these difficulties, the Committee stated, it has " . . . provided for federal pre-emption of the authority to regulate the design, use, manufacture and installation of marine sanitation devices."

14. The Michigan Watercraft Pollution Control Act of 1970, as applied to plaintiffs' vessels, is unconstitutional, null and void for the following reasons:

(a) The Michigan Watercraft Pollution Control Act of 1970 and the Federal Water Pollution Control Act, as

amended by the Water Quality Improvement Act of 1970, conflict to such an extent that both laws cannot be enforced without impairing federal superintendence of the field in that the state enactment stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress because state requirements with respect to standards of performance for marine pollution control devices nullify federal discretion over the subject matter and interfere or conflict with the purposes or provisions of the federal legislation.

(b) The clear and manifest intent and purpose of Congress in enacting the Water Quality Improvement Act of 1970 was to occupy the field in that it adopted a complete and comprehensive system of regulation for the disposal of sewage from vessels on navigable waters, and while the required federal standards have not yet been finalized, the fact that the Congress in enacting subsection (j) of Section 21 of the Water Quality Improvement Act of 1970, 33 U.S.C. Sec. 1155 (j), provided that the Secretary of the Interior shall report to Congress the results of such research, studies, experiments and demonstrations relative to equipment which is to be installed on board vessels designed to receive, retain, treat or discharge human body wastes prior to the effective date of any standards established under Section 13 of the Act, demonstrates an unambiguous Congressional mandate to the effect that it was occupying the field to the exclusion of all state regulations with respect to marine sanitation devices. Further, through the vessel inspection laws the Congress maintains an extensive and comprehensive set of controls over ships and shipping and provides for federal inspection of a very broad nature covering the boilers, underfired pressure vessels, and the appurtenances thereof, also hull strength and integrate, safety devices, sanitary conditions, navigational and communications equipment, life saving gear, propelling and auxiliary machinery, electrical apparatus and other equipment of all vessels of plaintiffs. Michigan, through the enactment of the Watercraft Pollution Control Act of 1970, now seeks to change

the federal standards for the structure and equipment of vessels by requiring the installation of holding tanks or incinerating devices, equipment which involves a material structural alteration of the vessel and affects safety and stability which are particularly within the expertise of the Coast Guard. The vessel inspection laws were enacted because the Congress recognized that standards and designs for the structure and equipment of vessels may not properly be left to the diverse action of the states. The vessel inspection laws and the Michigan Watercraft Pollution Control Act of 1970 are directed to the same subject, the equipment of vessels, and they operate upon the same object. The Michigan Watercraft Pollution Control Act of 1970 is void because the federal inspection laws and the Federal Water Pollution Control Act, as amended by the Water Quality Improvement Act of 1970, were intended to occupy the field.

(c) If the Congress has not expressly pre-empted the field, the Michigan Watercraft Pollution Control Act of 1970 materially affects interstate and foreign commerce in matters where uniformity is necessary and relates to a subject demanding exclusive federal regulation in order to achieve uniformity vital to national interests in that plaintiffs' vessels serve all of the eight Great Lakes states and the two Provinces of Canada bordering the Great Lakes; and, in performing a transportation service, it is impossible for them to comply with a multiplicity of standards in each state or Province. The subject matter of the Michigan Watercraft Pollution Control Act of 1970 demands material uniformity of regulation so that state action is altogether inadmissible even in the absence of federal action.

(d) Apart from Article 1 Sec. 8, cl. 3 of the Constitution, relating to interstate and foreign commerce, the Constitution itself adopted and established as part of the laws of the United States approved rules of general maritime law and empowered Congress to legislate in respect to them and other matters within the admiralty and maritime jurisdiction. The Constitution denies to the states.

all power by legislation to contravene the essential purposes of, or to work material injury to characteristic features of the maritime law or to interfere with its proper harmony and uniformity in its international and interstate relations. Only the Congress can legislate within this sphere. The installation and operation of sanitation devices on commercial vessels is maritime in nature and all rights, liabilities and obligations in connection therewith are matters clearly within the admiralty jurisdiction. The installation and operation of sanitation devices on commercial vessels plying the waters of the Great Lakes, involving as it does trade and commerce between and among some eight separate states and two Provinces of Canada, is national in character and admits and requires uniformity of regulation affecting alike all the states, and Congress alone can act upon it and provide the needed regulations. The Michigan Watercraft Pollution Control Act of 1970 undertakes to prescribe exclusive rights and liabilities, undertakes to secure their observance by heavy penalties and onerous conditions and provides novel remedies inconsistent with the uniform maritime law and, therefore, impairs federal superintendence and preservation of the uniform maritime law.

(e) If federal law has not pre-empted the field to the exclusion of all state regulation, then enforcement of the Michigan Watercraft Pollution Control Act of 1970, until such time as the field has been so pre-empted, constitutes the taking of plaintiffs' property without due process of law in violation of Sec. 1 of the XIV Amendment of the Constitution of the United States in that plaintiffs, before entering Michigan waters, will be required to make extensive and expensive alterations to their vessels in the installation of holding tanks and/or incinerating devices, which devices will or may become wholly obsolete and worthless upon the promulgation of federal standards and which devices are of no immediate benefit to anyone because there are as yet no waste discharge facilities available for commercial vessels in any of the ports of Michigan or the ports of any other states. The only alternative presently available to such ship

operation would be to discharge holding tanks in non-Michigan waters, thus creating untreated concentrations of sewage in the Great Lakes subject to the vagaries of wind and lake current. Further, with respect to those vessels which merely transit Michigan waters and do not touch at Michigan ports, there is no legal remedy for compelling the installation of pump-out facilities in any other state. Consequently, such vessels are precluded from complying with the Michigan Watercraft Pollution Control Act of 1970, even were they to install holding tanks or incinerating devices.

(f) If federal law has not pre-empted the field to the exclusion of all state regulation, then enforcement of the Michigan Watercraft Pollution Control Act of 1970, until such time as the field has been so pre-empted, constitutes a denial of the equal protection of the laws in violation of Sec. 1 of the XIV Amendment of the Constitution of the United States in that such Act makes it unlawful for a commercial vessel to discharge overboard any sewage, whether treated or not, while at the same time permitting shore-based industry and municipalities to discharge inadequately treated sewage into the waters of the Great Lakes. Requiring commercial vessels to discharge wastes ashore into municipal waste treatment systems merely compounds the problem in that the municipal waste treatment systems in the principal ports of Michigan have not yet met the standards for secondary treatment imposed upon them by the Michigan Water Resources Commission and the Federal Environmental Protection Agency. There is no evidence that by requiring commercial vessels to discharge wastes ashore there is any better treatment of sewage wastes than the vessels can provide themselves given adequate time to comply with anticipated federal standards for the performance of marine sanitation devices.

(g) If federal law has not pre-empted the field to the exclusion of all state regulations, then enforcement of the Michigan Watercraft Pollution Control Act of 1970, until such time as the field has been so pre-empted, is violative of constitutional requirements of due process and the equal

protection of the laws in that the Act, particularly Section 3(1) thereof, is vague and ambiguous inasmuch as it does not specify with sufficient certainty the conduct which it intends to proscribe and punish, to the extent that men of ordinary intelligence must guess at its meaning and differ as to its application with respect to what discharges render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes.

(h) The Michigan Watercraft Pollution Control Act of 1970 is unenforceable in that the State of Michigan has not, in compliance with Sec. 13(f) of the Water Quality Improvement Act of 1970, made application to the Secretary of the Interior to determine whether any applicable water quality standards require such a prohibition in any of the waters of the State of Michigan.

15. The enforcement of the Michigan Watercraft Pollution Control Act of 1970 is working upon plaintiffs an unusual hardship and irreparable injury and damage for which there exists no adequate remedy at law. Plaintiffs are under firm commitments for the transportation of cargo during the ensuing navigation season. To meet these commitments requires that they enter Michigan waters which they cannot do except in violation of Michigan law. Thus, on the one hand plaintiffs are threatened with claims and suits for the failure to deliver cargo vital to Michigan and indeed the nation's commerce and industry, while on the other hand they are faced with extensive fines and penalties for violation of the Michigan Watercraft Pollution Control Act of 1970. Upon the opening of the navigation season, which usually occurs on or about March 15, plaintiffs will suffer daily the loss of business and patronage in consequence of the enforcement of the Michigan Watercraft Pollution Control Act of 1970, and such enforcement will in operation and effect amount to a confiscation of the property rights of plaintiffs in violation of the Constitution of the United States.

16. A delay in ascertaining and determining the rights of plaintiffs will result in serious loss and damage in that

the navigation season of the Great Lakes is limited and the plaintiffs' rights have been, are now and will continue to be violated unless plaintiffs are protected from the unlawful acts hereinbefore complained of, and the continuation of such unlawful acts by persons purporting to derive authority from the Michigan Watercraft Pollution Control Act of 1970. The injuries which will inevitably flow from the performance of enforcement officials acting under authority of the Michigan Watercraft Pollution Control Act of 1970 will be irremediable unless relief be granted by the Court.

WHEREFORE, plaintiffs pray:

1. That pursuant to Sec. 2284 of Title 28 of the United States Code, a District Court of three judges be convened to hear this cause;

2. That the Michigan Watercraft Pollution Control Act of 1970 as applied to plaintiffs' vessels be declared unconstitutional, null and void;

3. That the Court restrain the defendants from the enforcement of the Michigan Watercraft Pollution Control Act of 1970;

4. That pending the final hearing and determination of this cause upon its merits the Court issue a temporary restraining order restraining defendants from enforcing the Michigan Watercraft Pollution Control Act of 1970 and for such other and further relief as shall be proper and necessary.

SCOTT H. ELDER,
Attorney for Plaintiffs,
2700 Terminal Tower,
Cleveland, Ohio 44113.

Of Counsel:
JOHNSON, BRANAND & JAEGER,
2700 Terminal Tower,
Cleveland, Ohio 44113.

JOHN ARTHUR HAMILTON,
3266 Penobscot Building,
Detroit, Michigan 48226.

Verification.

STATE OF OHIO,
COUNTY OF CUYAHOGA, SS.

SCOTT H. ELDER, being first duly sworn, deposes and says that he is one of the attorneys for plaintiffs herein; that he has read the foregoing complaint and knows the contents thereof; and that the same are true to the best of his knowledge; that each of the plaintiffs has received and approved a copy of said complaint; that he has authority in writing from each of said plaintiffs to file said complaint on its behalf; that the reason this verification is being made by the attorney and not by the plaintiffs is that the plaintiffs are exceedingly numerous in number and located in several different states; and that the urgency of the action makes it impractical to obtain such verification.

SCOTT H. ELDER.

(Jurat omitted in printing.)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION.

(Title omitted in printing.)

AFFIDAVIT OF VICE ADMIRAL PAUL E. TRIMBLE, U.S.C.G. (Retired), LAKE CARRIERS' ASSOCIATION.

(Dated March 16, 1971.)

STATE OF OHIO,
COUNTY OF CUYAHOGA, SS.

Vice Admiral Paul E. Trimble, U.S.C.G. (Retired), being first duly sworn, deposes and says:

1. That he is the duly elected, qualified, and acting president of Lake Carriers' Association, a non-stock, non-profit Ohio Corporation.

2. That the membership of Lake Carriers' Association consists of some 21 companies, 19 of which are the individual plaintiffs named herein; that all such companies own and/or operate Federally licensed Great Lakes bulk cargo vessels.

3. That one of the primary purposes and functions of Lake Carriers' Association is to promote and foster the development of Great Lakes commerce.

4. That as of the filing of the complaint herein, the Great Lakes navigation season is currently under way in that many vessels are in the process of fitting out and ready to sail, that some vessels have already sailed and that at least two vessels plan to begin operations in Michigan waters today.

5. That collectively the plaintiffs herein own and/or operate 187 American flag Great Lakes bulk cargo vessels, all of which are Federally enrolled and licensed for employment in the coasting or foreign trade on the Great Lakes.

6. That enforcement of the Michigan Watercraft Pollution Control Act of 1970 is working upon plaintiffs an

unusual hardship and irreparable injury and damage for which there exists no adequate remedy at law in that plaintiffs are under firm commitments for the transportation of cargo such as iron ore, coal, limestone, grain, petroleum, cement, sand, gravel, salt and other commodities, and that to meet these commitments requires that they transit Michigan waters which they cannot do except in violation of the Michigan Watercraft Pollution Control Act of 1970; that on the one hand, plaintiffs are threatened with claims and suits for the failure to deliver cargo vital to Michigan and the nation's commerce and industry, while on the other hand, if they do perform their transportation contracts they are faced with extensive fines and penalties in violation of the Michigan Watercraft Pollution Control Act.

7. That the Michigan Watercraft Pollution Control Act of 1970 is unconstitutional, null and void, and the enforcement thereof will, in operation and effect, amount to a confiscation of the property rights of plaintiffs in violation of the Constitution of the United States.

8. That any delay in ascertaining and determining the rights of plaintiffs will result in serious loss and damage because of the limited nature of the Great Lakes navigation season and the injuries which will inevitably flow from the performance of enforcement officials acting under authority of the Michigan Watercraft Pollution Control Act will be irremedial unless relief be immediately granted.

9. That plaintiffs are now being delayed in the fit-out of vessels and assumption of navigation, and they will suffer irreparable loss and damage if prevented from performing their obligations for the movement of cargo.

10. That the imminence of the navigation season prevents notice to said defendants and a hearing on the temporary restraining order requested herein.

Further affiant saith naught.

PAUL E. TRIMBLE.

(Jurat omitted in printing.)

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION.

(Title omitted in printing.)

TEMPORARY RESTRAINING ORDER.

(Issued March 16, 1971.)

Note: This order is printed in the Jurisdictional Statement at page 34 and is here omitted.

ORDER EXTENDING TEMPORARY RESTRAINING ORDER.

(Filed March 26, 1971.)

Note: This order is printed in the Jurisdictional Statement at page 36 and is here omitted.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION.

(Title omitted in printing.)

DEFENDANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR ABSTENTION.

(Filed April 5, 1971.)

NOW COME defendants, by their attorneys, Frank J. Kelley, Attorney General of the State of Michigan, and Jerome Maslowski and Francis J. Carrier, Assistant Attorneys General, and pursuant to F.R.C.P. 12(b)(6)(7), move this Court to dismiss plaintiffs' complaint, respectfully representing to the Court:

1. The complaint fails to state a claim upon which relief may be granted for the reasons that:

(a) Federal standards of performance for marine sanitation devices to prevent the discharge of untreated or inadequately treated sewage into or upon the navigable waters of this State, as required under 33 USC, Section 1163, have not been adopted and, until such standards are promulgated, there can exist no conflict between the Federal Water Pollution Control Act, as amended, and Michigan law.

(b) That the appropriate federal agency's power to issue regulations remains unexercised and defendants may, as a matter of law, continue regulation under Act 167, PA 1970, until further federal action is taken.

(c) Congress, by enactment of Sections 1151(b), 1151(c) and 1160(b) of the Federal Water Pollution Control Act, as amended, has reserved to the State of Michigan the responsibility and right to prevent and control pollution of its navigable waters, thereby signifying a congressional intention not to preempt the State's exercise of that power.

(d) The regulation of pollution in the waters of this State under Act 167, PA 1970, is a matter of local State interest for protection of the public health, safety and welfare, is a proper exercise of the State's police power and congressional intention to preempt State regulation is not clearly and definitely expressed in the Federal Water Pollution Control Act, as amended.

(e) The Commerce clause of the federal constitution does not prohibit defendants from regulating pollution of the waters of the State, even though the State regulation has an impact on interstate commerce.

(f) That regulation of water pollution pursuant to authority of Act 167, PA 1970, is not in itself the regulation of interstate commerce but a valid exercise of the state police power and all presumptions should be invoked to find that it is constitutionally exercised.

(g) That, in the absence of an express contrary command of Congress not present here, the imposition of minimum federal standards of performance for marine sanitation devices does not prohibit the adoption of more stringent state standards.

(h) That Act 167, PA 1970, regulates even-handedly all watercraft on the navigable waters of this State to effectuate a legitimate public interest affording all equal protection of the laws without discrimination, the statutory impact on interstate commerce being only incidental and not constituting a direct burden on interstate commerce.

2. The complaint fails to state a claim upon which relief may be granted for the reasons that:

(a) The Court lacks jurisdiction because the State of Michigan is immune from suit under the Eleventh Amendment to the federal constitution.

(b) The Court lacks jurisdiction over the person of the State officers and agencies named herein for the reason that a suit against said officers and agencies is a suit against the sovereign State of Michigan.

3. The complaint fails to state a cause of action upon which relief may be granted against the Attorney General, State of Michigan, for the reason that said State officer is not in the first instance charged with the duty and responsibility of enforcing the criminal provisions of Act 167, PA 1970, but acts only in the event of failure of prosecution on the local level, such failure to act not being shown by plaintiffs.

4. The complaint does not state a claim upon which relief may be granted against defendants, Michigan Department of Natural Resources, Michigan Water Resources Commission, Ralph A. MacMullan and Ralph Purdy, for the reason that said State officers and State agencies are without authority to enforce the penalty provisions of Section 11 of Act 167, PA 1970.

5. Alternatively, the State defendants request this Court to refrain from taking any further action in these proceedings until plaintiffs institute an action in the State courts for determination of the constitutional validity of Act 167, PA 1970, which issue of State law can only be authoritatively construed in the State tribunals.

6. Alternatively, the State defendants request that the complaint be dismissed by reason of failure to join indispensable parties, the prosecuting attorneys of this State who are charged with the duty and responsibility, in their respective counties, of enforcing the penal provisions of Section 11, Act 167, PA 1970, pursuant to the statute in such case made and provided (MCLA 49.153; MSA 1961 Rev. Vol. 5.751).

This motion is based upon the records and files of this Court.

WHEREFORE, defendants pray that the above entitled complaint be dismissed with prejudice.

FRANK J. KELLEY,
Attorney General,
JEROME MASLOWSKI,
FRANCIS J. CARRIER,
Assistant Attorneys General,
By: FRANCIS J. CARRIER,
Attorneys for Defendants.
Business Address:
630 Seven Story Office Bldg.,
525 West Ottawa Street,
Lansing, Michigan 48913.

Dated: April 5, 1971.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION.

(Title omitted in printing.)

ANSWER TO COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF.

(Filed April 26, 1971.)

Reserving all manner of benefit arising out of the many insufficiencies and inconsistencies of plaintiffs to state a cause of action upon which relief can be granted, and expressly reserving the grounds alleged in support of defendants' motion to dismiss, or in the alternative, for abstention, now comes the Attorney General, State of Michigan, on behalf of defendants, and answering the complaint filed in this cause, says:

1. Answering paragraph one, defendants admit plaintiffs seek a declaratory judgment in the above entitled cause pursuant to the statutes enumerated in said paragraph. As to the remaining allegations of said paragraph, defendants deny the same.

2. Answering paragraph two, defendants admit plaintiffs claim jurisdiction on the statutory and constitutional grounds therein alleged. Further answering said paragraph, defendants admit plaintiffs allege jurisdiction under the Boundary Waters Treaty of 1909 and say that said treaty is irrelevant and immaterial to the issues of fact and law presented for determination in this cause. As to the remaining allegations of said paragraph not specifically answered, defendants leave plaintiffs to their proofs.

3. Answering paragraph three, defendants lack information sufficient to form a belief as to the jurisdictional averments therein alleged and leave plaintiffs to their proofs.

4. Answering paragraph four, defendants are without knowledge or information sufficient to form a belief as to truth of said allegations and leave plaintiffs to their

proofs. Further answering said paragraph, defendants allege that plaintiff, Lake Carriers' Association, is without authority to vicariously assert the constitutional rights of the individual plaintiffs named herein and allege further that said Association is not the real party in interest entitled to prosecute suit in this proceeding.

Further answering paragraph four, defendants allege that this proceeding is based upon plaintiffs' claim that a State statute is preempted by, or in conflict with, the Federal Water Pollution Control Act, as amended (33 USC § 1151, et seq), and said issue of law involves the comparison of two statutes, rather than claimed abridgment of federal constitutional guarantees, as alleged by plaintiffs.

5. Defendants lack information sufficient to form a belief as to the allegations of paragraph five and leave plaintiffs to their proofs, except that defendants admit the individual plaintiffs, other than Lake Carriers' Association, are the owners and/or operators of 187 American Flag Great Lakes bulk cargo vessels.

6. Defendants are without sufficient information to form a belief as to the allegations of paragraph six, except to say that consideration of the Boundary Waters Treaty of 1909 is irrelevant and immaterial to the issues of fact and law before this Court, and defendants leave plaintiffs to their proofs.

7. The Attorney General, State of Michigan, does not have sufficient information to form a belief as to the allegations of paragraph seven, except that the allegations recited in the first sentence of said paragraph seven are admitted.

8. Answering paragraph eight, defendants are without sufficient information to form a belief as to the allegations that plaintiffs are interested in "clean water," preservation of the ecology of the Great Lakes, or that said parties are desirous of protecting the water quality of the Great Lakes through the installation of marine sanitation devices consistent with maritime health and safety.

Further answering said paragraph, defendants say that numerous commercial and other vessels utilizing the waters of the Great Lakes, including vessels of the Ford Motor Company, the United States Coast Guard, and the United States Corps of Engineers have voluntarily undertaken a program of installing marine sanitation devices meeting the requirements of Act 167 of the Public Acts of 1970, State of Michigan.

Further answering said paragraph, defendants deny that a proliferation of state laws throughout the Great Lakes impose different requirements despite the amendments to the Federal Water Pollution Control Act and, in support of the denial, state that federal standards of performance for marine sanitation devices on plaintiffs' vessels, as defendants are informed and believe, are not promulgated to date and, if promulgated by the Environmental Protection Agency under 33 USC § 1163(b), the effective date of the standards is unknown.

Further answering said paragraph, defendants say that regulations required to be promulgated by the Coast Guard under that statutory section have not been drafted to date, the effective date of said regulations is unknown and, as a matter of law, until regulations promulgated by the United States Coast Guard are effective, the standards adopted by the Environmental Protection Agency may not be made effective. Further, that upon the promulgation of federal standards by the Environmental Protection Agency, said standards will not be effective as applied to plaintiffs for five years, for existing vessels, and two years for new vessels.

Further answering said paragraph, defendants deny that plaintiffs have any legal basis for the declaratory and injunctive relief here sought. As to the remaining allegations of said paragraph eight not specifically answered, defendants deny the same.

9. Defendants admit the allegations recited in the first, second and third sentences of paragraph nine, except that defendants deny that Ralph W. Purdy or Water Resources Commission, Michigan Department of Natural

Resources, are charged with enforcement of the penal provisions of Act 167 of the Public Acts of 1970, State of Michigan. Defendants admit Frank J. Kelley is the duly elected, qualified and acting Attorney General, State of Michigan, with official residence in Lansing, Michigan, and deny that it is the duty of said state officer to prosecute, in the first sentence, violations of Act 167 of the Public Acts of 1970, State of Michigan.

10. Answering paragraph ten, defendants admit that sections 3, 4 and 8 of Act 167 of the Public Acts of 1970, State of Michigan, as alleged by plaintiffs, regulate and control the disposal of garbage, litter, sewage, or oil from federally licensed ships while in Michigan waters. As to the remaining allegations of said paragraph not specifically answered, defendants deny the same.

11. Answering paragraph eleven, defendants admit that section 11 imposes penalties for violation of Act 167 of the Public Acts of 1970, State of Michigan. As to the remaining allegations of said paragraph, defendants deny the same and, in support of the denial, say that plaintiffs have filed this suit just days prior to the opening of the 1971 shipping season, that Act 167 of the Public Acts of 1970 was enacted eleven months prior to the filing of suit, to-wit: on *April 3, 1970* and that, contrary to the allegations of said paragraph, plaintiffs had ample time to make alterations to their vessels to effect compliance with the requirements of said State statute, and that plaintiffs have not, and are not now, being prevented from the use and enjoyment of their properties by alleged improper and unlawful molestations and interference of defendants, or of any of them, as claimed by plaintiffs. As to the remaining allegations of said paragraph not specifically answered, defendants deny the same.

12. Answering paragraph twelve, defendants admit that a conference was held in the early part of 1968 by the conferee states bordering Lake Michigan, and deny that the conferees agreed discharge of wastes from commercial vessels should be the responsibility of the federal government.

Further answering said paragraph, defendants admit that on or about April 3, 1970, the Water Quality Improvement Act of 1970 was enacted, amending the Federal Water Pollution Control Act, as alleged in paragraph twelve of the complaint, except that defendants point out that § 1163, as so amended, provides that "As soon as possible, after *April 3, 1970, and subject to the provisions of section 1155(j) of this title,* the Secretary . . . shall promulgate Federal standards of performance for marine sanitation devices . . ." [33 USC § 1163(b)(1)].

As to the remaining allegations of said paragraph twelve not specifically answered, defendants deny the same.

13. Answering paragraph thirteen, defendants state that plaintiffs' reliance upon committee reports, allegedly expressing the view that the Federal Water Quality Improvement Act of 1970 would preempt state authority, is irrelevant in this proceeding for the reason that the committee report is not the statute enacted by Congress, nor do those portions of said report recited by plaintiffs necessarily signify the intention of Congress in enacting the federal statute.

Further answering said paragraph, defendants say that section 1 of the Federal Water Pollution Control Act, as amended, expressly declares the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution [33 USC § 1151(b)], the right or jurisdiction of the States with respect to their waters (including boundary waters) remains unimpaired [33 USC § 1151(c)], and the Congressional declaration of state participation is only prohibited after the effective date of the initial standards and regulations promulgated under this section [33 USC § 1163(f)].

14. Answering paragraph fourteen, defendants deny each and every allegation therein, the allegations of said paragraph and each of its subdivisions, (a), (b), (c), (d), (e), (f), (g) and (h), being contrary to both fact and law.

Further answering said paragraph, defendants say that Act 167 of the Public Acts of 1970 is valid and constitutional in all respects, is a proper exercise of state legislative power for the purpose of promoting the public health, safety and welfare and its enactment does not unduly burden interstate commerce of these plaintiffs. Further, that Congress has not exhibited its intention to preempt said state statute by enactment of the Federal Water Pollution Control Act, as amended (33 USC §1151 et seq).

15. Answering paragraph fifteen, defendants deny the allegations of said paragraph and each and every sentence thereof in form and substance.

16. Answering paragraph sixteen, defendants deny each and every allegation recited therein.

WHEREFORE, defendants pray that the complaint be dismissed with prejudice and with costs to defendants.

FRANK J. KELLEY,
Attorney General,

JEROME MASLOWSKI,
FRANCIS J. CARRIER,
Assistant Attorneys General.

By: FRANCIS J. CARRIER,
Attorneys for Defendants.

Dated: April 23, 1971.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION.

(Title omitted in printing.)

STIPULATION OF FACTS.

(Filed June 8, 1971.)

Lake Carriers' Association is a non-stock, non-profit Ohio corporation, the membership of which consists of 21 separate companies owning and/or operating a total of 194 Great Lakes bulk cargo vessels. Of the 21 members of the Lake Carriers' Association, 19 are individual plaintiffs in this case. In all, such 19 plaintiffs own and/or operate a total of 187 Great Lakes bulk cargo vessels, such plaintiffs and their vessels being identified in the membership booklet of Lake Carriers' Association attached hereto, made a part hereof and marked Exhibit A.

All of the vessels owned and/or operated by plaintiffs are federally enrolled and licensed for employment in the coasting and foreign trade on the waters of the northern, northeastern and northwestern frontiers, otherwise than by sea, pursuant to the Act of February 27, 1877 (46 U.S.C. Sec. 258). All of plaintiffs' vessels are subject to the provisions and regulations of the federal vessel inspection laws administered by the United States Coast Guard, the same being Title 52 of the Revised Statutes (46 U.S.C. Sec. 361, et seq.).

In all, as of January 1, 1970, there were a total of 442 vessels in excess of 1,000 tons on the Great Lakes. Of this total, 263 were vessels of United States registry, having a combined tonnage of 1,802,776 gross tons, and 179 were vessels of Canadian registry having a combined tonnage of 1,576,165 gross tons. The composition of the Great Lakes commercial fleet is more fully described on pages 40, 41 and 42 of the Annual Report of Lake Carriers' Association for the year 1969, annexed hereto, made a part hereof and marked Exhibit B.

Plaintiffs are engaged in the business of providing vessel transportation, some for their own account and some for the account of others, or both, throughout the entire Great Lakes-St. Lawrence Seaway System, serving in interstate commerce and/or foreign commerce a variety of ports in the states of Minnesota, Wisconsin, Illinois, Indiana, Michigan, Ohio, Pennsylvania, New York; and the Provinces of Ontario and Quebec, Canada. The principal trade patterns of the Great Lakes are as shown by the series of flow charts attached hereto, made a part hereof and marked Exhibit C. These charts, prepared by the Great Lakes Regional Statistical Office of the Corps of Engineers for the year 1964 (the last year for which such charts are available) show by principal commodities the commerce of the Great Lakes and fully demonstrate the interstate and foreign nature of that commerce. The trade patterns shown are typical of those existing today, the only difference being in the volume of the cargo movement. The lake bulk freight commerce by years is shown on pages 52, 53 and 54 of Exhibit B. It is stipulated and agreed that the Annual Report of Lake Carriers' Association for the year 1969 (the last year for which such Report is available) actually reflects the water borne commerce of the Great Lakes insofar as American and Canadian registered vessels are concerned and is entered into evidence. Further, it is stipulated and agreed that plaintiffs' vessels are engaged in interstate and foreign commerce.

During the 1969 shipping season, consisting of a period of 281 days, there were 14,059 passages through the Detroit River, exclusive of sand carriers and passenger vessels. Of the total, 6,052 represented Great Lakes vessels and 979 were ocean vessels upbound. In the downbound direction, there were 6,049 Great Lakes vessels and 979 ocean vessels or a total of 7,028. Thus, there was an average of 50 passages per day or one vessel every 29 minutes.

With respect to the commerce at Sault Ste. Marie, Michigan and Ontario during 1969, there were 13,494

transits of the United States locks and 4,455 transits of Canadian locks or a total of 17,949 passages.

SCOTT H. ELDER,
Attorney for Plaintiffs.

JEROME MASLOWSKI,
Assistant Attorney General, State of Michigan.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION.

MEMORANDUM OPINION DISSOLVING TEMPORARY RESTRAINING ORDER AND DISMISSING COMPLAINT WITHOUT PREJUDICE.

(Filed and Entered July 12, 1971.)

Note: This opinion is printed in the Jurisdictional Statement at page 21 and is here omitted.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION.

TRANSCRIPT OF PROCEEDINGS.

(Filed May 6, 1971.)

Proceedings had and testimony taken in the above-entitled and numbered cause before the Honorable George Clifton Edwards, Jr., Circuit Judge, the Honorable Damon J. Keith, District Judge, and the Honorable Philip Pratt, District Judge, at Detroit, Michigan, commencing on Monday, April 26, 1971, in the forenoon.

APPEARANCES:

JOHNSON, BRANAND & JAEGER,
2700 Terminal Tower Building,
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BY SCOTT H. ELDER, ESQ.,

and

FOSTER, MEADOWS & BALLARD,
3266 Penobscot Building,
Detroit, Michigan 48226,

BY JOHN ARTHUR HAMILTON, ESQ.,
For the plaintiffs.

FRANK J. KELLEY, *Attorney General,*
630 Seven Story Office Building,
525 West Ottawa Street,
Lansing, Michigan 48913,

BY JEROME MASLOWSKI, ESQ., and
FRANCIS J. CARRIER, ESQ.,
Assistant Attorneys General,
For the defendants.

* * * * *

(25)

DAVID GROH, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION by Mr. Elder.

Q. Mr. Groh, would you please tell us your present occupation? A. My present occupation is vice president, marine manager of Interlake Steamship Company, which in turn is owned by, or is a division of Pickands Mather, which in turn is a wholly-owned subsidiary of Diamond Shamrock Corporation.

* * * * *

(26) Q. What is your educational background, Mr. Groh? A. My background is, attended the University of Michigan; I obtained a Bachelor of Science degree in 1944 in the School of Marine Engineering and Naval Architecture.

Q. Did you have any further education after that? A. From there on, as it was in a practical sense, military service, United States Navy; and from there, upon discharge, as a—I served in the Engineering Department at the Detroit Edison Company for a short term; and then proceeded to Great Lakes Engineering Works, the shipyard, as it existed in this area at that time; then for the last 23 years I have been associated at the present occupation previously described.

Q. What has been the nature of your duties with Interlake Steamship Company? A. My duties through my tenor of employment have been involved with, first, the mechanical end of the business, that is, the ship structure, ship machinery, maintenance, improvements (27) of these items; and then in later years, as a little closer related to the business aspects, of dispatch, cargo, business management, to the present position I am holding.

Q. How many ships does Interlake Steamship Company operate? A. Interlake owns 15 Great Lakes vessels and presently is operating 13 of these directly; the other 2 are on charter, being operated by others.

Q. What is the nature of these vessels? A. The nature of the vessel is that they are typical Great Lakes vessels, outfitted for the carrying of bulk cargo, what is termed the straight-deck vessels, in that they do not unload themselves as they depend on shore facilities for their unload.

They have the capability of operating within the Great Lakes system as far east, really, as Anacostia Island, which is in the Gulf of St. Lawrence. That is not the normal trade but they have this capability. They are in size, have the ability to transport from twelve thousand tons, land tons, bulk material, up to twenty thousand tons.

* * * * *

(28) Q. Now, what commodities do you carry in your vessels, Mr. Groh? A. We carry principally iron ore and then in a secondary fashion, coal and stone.

Q. Now, would you please point out on the chart of the Great Lakes which we have here, principally in the iron ore trade, what ports you trade to and from and then name the ports, please, so that they will be on the record? A. Well, our loading of iron ore all takes place in this north shore area of the Minnesota ports; and it would be predominantly at this port, Taconite Harbor, better than half of our material is loaded here. The balance is split between the ports of Silver Bay, two harbors, at Duluth and Superior itself. So that entire 80-mile stretch of shoreline represents the loading location of all of our iron ore as for our fleet. We then discharge this ore—there is a general split of the trade, after you depart the lower end of the St. Mary's River and it goes, in our situation, about equally split, down into Lake Erie and over into Lake Michigan.

(29) In the Lake Michigan area, we discharge principally at one of several docks in the Calumet River; also very heavy tonnage at Indiana Harbor, in this area; and now this last year, there is a new port called Burns Harbor—it is in connection with a new steel mill—and we do trade in this area. On the other side, the Lake Huron, Lake Erie situation, we discharge iron ore principally at

Toledo, Huron, Lorain, very heavy at Cleveland, Ashtabula, and occasionally at Conneaut and very heavy into Buffalo.

That is a general description of where we load ore and where we discharge it.

Q. How about coal? A. Our coal movement is all upbound and we have two principal movements; one is coal loading at Toledo and this is coal that is of metallurgical quality, and we discharge that across to Milwaukee. It is for the purpose of making coke. Our second major movement of coal is a loading here in the same Calumet River area. This is steam coal and this proceeds on the upbound voyage to Taconite Harbor for power-plant operation.

Q. How about the stone? A. Stone is a—represents less than ten per cent of our trade. Stone is loaded at the ports here, Rogers City, and also (30) Presque Isle, so-called Stone Port; and this in turn would be discharged in our case to the same steel plants here, into Lake Michigan, or, Lake Erie, as I previously mentioned, used in connection with the steel industry.

Q. What about grain? A. Grain is a spasmodic commodity, as I didn't mention it before, we do occasionally take a load of grain, actually, we are in the process of doing it right now. Grain is loaded in this Duluth-Superior area, and for the most part is discharged at Buffalo. And that is, we have three ships so engaged at this very moment, all three of which are paralyzed in the ice in the Buffalo area.

Q. Then, in your testimony, Mr. Groh, you indicated then that only in connection with stone do you actually touch at a Michigan port? A. That is correct. That would be our only normal trade that we have been conducting as on a year-to-year basis, that is, Michigan—of origin in Michigan.

Q. Now, how many men in your crews? A. They range from thirty to thirty-five.

Q. Now, how much liquid or waste or whatever you want to call it is generated per day on a vessel, per man? A. Well, we have made, as best we can, several measurements of this and we come to an amount in the neighborhood of 125 (31) gallons of liquid per man per day.

Q. And what would this— A. This being a minimum kind of number.

Q. What does this include? A. Well, this would include wash water, or drains from the normal showers, also the vehicle water as to handle sanitary facilities.

Q. Well, now, considering the nature of your trade and the number of men in your crews and the amount of water generated and so forth, have you given any consideration or made any calculation with respect to holding tanks? A. Yes, we have.

Q. What were those calculations? A. Well, we feel that with our trade pattern that we would have to have holding tanks capacity in the order of not less than 20,000 gallons at either end of the vessel, a total of 40.

Q. A total of 40,000 gallons. Why is that? A. Well, it is principally to take care of the time element involved. In our trade pattern, as I tried to describe it here, we have some long trips, as far as the Duluth to Buffalo, where we have to transit the two connecting rivers and of course just the sheer mileage element of it, it's a long, a long trip and one that is quite (32) susceptible to delays. And, in fact, that is the large delay we are running into right now, two of those vessels that I mentioned in the Buffalo area, two of the three have been in voyage now some thirteen days without benefit of really any opportunity to use a shore facility.

Q. Well, now, in planning something like this, the size tank you will put in, why do you plan to contain all of it rather than just the human waste? A. Well, as we understand it, this is where we would have to go, eventually, that this is not our first approach. We would prefer to treat the sanitary waste but if we are under a no-discharge situation, we must look at all containment then.

Q. Do you know what a noxious substance is? A. Well, I think I would know one if I were close to it. However, I don't know a legal or a normal definition, no.

Q. So, it would be your position, then, Mr. Groh, if you were to put in a holding tank, you would want to contain everything so that any noxious substance would

be covered? A. Yes, it would. There is a great expense in the time element of reconstructing a vessel and if we are going to do this, we would certainly want to have the feeling that when we were doing it, it would cover the entire situation.

(33) Q. Now, how big a tank would this be at each end? A. Well, we are talking about a tank that is, oh, in the order of twenty by ten by thirteen or about the size of a one-and-a-half car garage at either end of the vessel.

(Whereupon plaintiffs' proposed Exhibit No. 2 marked by the reporter.)

Q. Now, Mr. Groh, would you please examine this document that has been marked as Plaintiffs' Exhibit 2 and indicate what it is, please? A. Well, this is a profile of a deck plan of one of the larger ships of our fleet. This is a 25,000 tonner which would represent in turn as large a ship as you will find on the lakes today.

Q. Would you please point out to the court the various spaces there and what is located in the space? A. This ship is a cross section and, moving back from the bow is this area up to where I have the pointer, is termed the forepeak and this is the collision bulkhead, and, normally, this is really a void space preserved for the protection of the vessel and also may include some machinery this day and age, as with the bowthruster. This would be the area where this machinery would now be located. However, you don't usually put serviceable gear, not gear that you are going to use daily.

(34) In the next area, from here to here, is normally termed the blind hole—blind. And this area is used for storage now of potable water, drinking water, which the vessel does have to carry, and that is this tank that is cross-hatched right in the center of this blind hole area. Above this level are all living quarters for the crew and, of course, the pilothouse and the navigational spaces for the vessel.

From this point aft are the cargo holds, in this case, in this ship, there are four holds, one, two, three, four;

and which brings you to the machinery section, from here aft, below the so-called spar deck level, from this level down is all occupied by the vessel's propulsion equipment; fuel tanks, and associated equipment to make the vessel serviceable. From this deck up, once again, is the living quarters, primarily supplying the rooms for the afterend crew and also back aft is the galley, all of the commissary spaces are located aft.

Q. What is the space underneath the cargo hold? A. That is a ballast tank which you see here. It is an inner bottom but it is used for ballast water. The entire length of the vessel. The tanks aft under the (35) engine space are also used for feed water, pure water, for use in the boilers, reserve feed water.

Q. Now, if you were to put these large tanks in, Mr. Groh, where in this particular vessel would you be able to put them? A. I am not too sure. There is no space that is left open and unused as it is all used for some purpose right now. So in a sense you would have to either relocate existing or pack in tanks, maybe this tank that I referred to as a 20,000-gallon tank, you certainly aren't going to put that up against your drinking water tank. There would have to be a void. It might have to be separated in a number of smaller tanks, actually, to get that kind of capacity.

There is no hope of using a ballast tank for untreated sewage as this seems extremely impractical. Back aft, you have the same problem as there is no open space that, in which—now, back aft, here, there is a tank that is used for drinking water. That was built into the vessel originally and there is no other open space other than relocating, as I am not too sure that is a practical solution, or going up on deck. And, to go on deck, it brings other problems of carrying a weight that high in the vessel, it would have to (36) be a substantial construction as to handle such a tank of that size and weight high up in the ship.

Q. Why is it not practical to put untreated sewage in your ballast tank? A. Well, because all of these tanks, of course, are the main structure of the vessel and they

are subject to periodic inspection to maintain this structural integrity of the vessel, and this happens, of course, on short notice, if there is any suspect of the ship's hull envelope, has suffered damage, or as also happens, even without suspect of damage, every year, at least once annually, inspections are carried out within the inner bottoms; and then, of course, we have a five-year requirement for both the American Bureau of Shipping and the Coast Guard in which there is a total inspection of all spaces.

Q. How is this inspection made? A. It is made by men actually entering the tanks and examining, crawling in the tanks physically with a light and a small hammer and to actually visually inspect the structure within the tanks.

* * * * *

(37) Q. Going back to plaintiffs' Exhibit 1, Mr. Groh, where would pump-out facilities have to be established if you were to put these tanks in your vessels? A. Well, in order for us to conduct our normal trade in a businesslike manner, we would have to have pump-out stations at all of the—at one end of the—at one end or the other, we would have to have, or probably both, at the loading ports and unloading ports, so, I think we are talking about a pump-out station at basically every port I mentioned. These ports, as far as loading, however, or on a practical basis, the loading period is so short in time and you are shifting the vessel, if you are under an ore dock from spout to spout, this is really not a very practical spot that you would pump out while you are loading.

The more practical pump-out would be at discharge, at an ore receiving facility where you normally (38) would be in port from, oh, an eight-hour, an eight- to ten-hour period, and not repositioning the vessel during that period; but that would, of course, mean that you would need pump-out facilities at all of those various ports that I named earlier.

Q. In other words, for the servicing of your trade, you would have to establish ports outside of Michigan? A. Oh, yes.

Q. In other states? A. Oh, yes.

Q. All right, now, Mr. Groh, what is your relationship to the Lake Carriers' Association? A. Well, I am naturally a member, but I am also the chairman of the Fleet Engineering Committee.

Q. What is the Fleet Engineering Committee? A. Well, the Fleet Engineering Committee is a standing committee which treats with problems that are basically of a mechanical nature to the ships, as propulsion, as services of a mechanical nature, boilers, main engines, and, of course, all the associated systems that go with the ship, like your refrigeration, the drinking water system, and, of course, we have been considering for some time the treatment of sewage.

Q. In what form has this deliberation taken, in what form has (39) it taken? A. Well, the most recent time is we have been involved with reviewing what the various ships of the members of the association have done with their vessels as far as equipping them and looking—from that experience, looking ahead to what we would recommend should be done in the future. And we did develop a report along these lines.

Q. And what would you recommend? A. Well, our recommendations included a, well, a test program, and the test program in turn was split into three, three parts.

We were going to look at incineration and also at what we called full holding and partial holding. And the partial holding was where you would have a treatment plant which would remove the most obnoxious material. It would treat the effluent and of course then discharge the effluent at some known quality, but, would seem to have the advantage to us that of reducing the total volume as to be handled aboard ship. Those were the three principal areas which we felt deserved further investigation.

Q. Well, now, on this partial containment system that you mentioned, what would be the result in ports, for example, (40) when you come to the dock? A. Well, if we still had to pump out the effluent ashore?

Q. Well, could you retain the effluent? A. Well, we could—we could contain it while we were in port.

Q. That's what I mean. A. Yes, we would have the ability to contain it while we were in port that eight or ten hours. If it was then acceptable as when we were away from the restricted waters, so as to discharge this, yes, we could make a practical attempt at a system that incorporated this as a concept.

Q. In other words, actual treatment aboard the vessel then? A. Yes, it would be treated.

Q. What level of treatment do you think you could achieve? A. Well, I would think we could achieve, well, some of the ships have in a sense treatment that is similar to primary now and I would think that we could come to a secondary level without too great a difficulty.

* * * * *

Q. Now, Mr. Groh, I hand you here a document marked Plaintiffs' Exhibit 3. Would you please tell us what that is? A. Well, this is a listing of ships that have been equipped with sewage treatment equipment and that obviously was prepared by American Shipbuilding Company because they (41) are the people who have built this equipment to date.

Q. What is the nature of that equipment? A. Well, from the ships involved here, by their names and I can recall the time they were built, this is the equipment that is of a macerating-chlorinating type.

Q. How does it compare to primary treatment? A. It compares very, very well.

Q. Such as primary treatment on land? A. Very close to primary treatment.

* * * * *

Q. Now, Mr. Groh, I hand you here a document marked as Plaintiffs' Exhibit 4. Would you examine that and tell us what it is, please? A. Well, this is a kind of initial listing only this picks up the vessels' names and time from the biogest development, in other words, you might call this a second generation of the sewage treatment equipment.

Q. What is the biogest? A. Well, the biogest is a sewage treatment plant which is on the aerobic concept,

you actually use compressed air along with the holding of the material and it is by admitting the air and the oxygen in it, you have a digestive process going on. This is really approaching, in many ways, (42) secondary treatment.

Q. The same as in the municipalities? A. Very close.

Q. Now, Mr. Groh, is it practical with this biogest system to provide a holding tank after the effluent has been treated so that you could retain your waste in port? A. I believe it would be, yes, once again, if we did not have to hold materials, you see, as I said, on loading time of eight to ten hours, say, give it another two hours, something like twelve hours as retention time is where we would discharge no effluent whatsoever, I think that is practical.

Q. But then you would have to discharge it out in the lake on the run, is that right? A. That's right, after you have cleared port, you go well beyond shoreside facility, we would then look forward to discharging the effluent, the treated effluent.

Q. What other devices have you attempted to develop—I am thinking specifically of other vessels now. A. Well, in our own case, we have taken on the trial of an incinerating situation as we have equipped two of our vessels strictly on an experimental basis, a trial basis. They are just now in operation this last two weeks. The one ship here has made a preliminary report and we still have some problems aboard. So far, the information is (43) sketchy, of course, but we seem to have a problem of incinerating, of handling the volume. We can incinerate but we are, by observation, not by measurement yet, but by observation, trying to vaporize too much volume for the set-up that we have.

Q. Why is volume a problem? A. Well, the volume in this case, this happens to be a—we are putting the material into the main boilers of the vessel hoping to make use of the—as much of the parent equipment in the ship as possible. If we could introduce this into the hot zone of the boiler, we had hopes that it could be vaporized and the material completely incinerated. However, you can see

that if you admit too great a volume in any one area of the furnace, you just absorb too much heat from the furnace to totally do the job and instead of the material vaporizing in a sense while it is airborne and passing up through the passages of the flues of the boiler, you are getting still condensation dropping to the floor of the boiler, in this case, through the grates. That is what we can observe as being an obvious thing, too much volume.

Q. Well, what other devices are you familiar with that might be in the experimental stage? A. Well, there are several others. There are devices of the electrical-chemical type. These have been developed by (44) different manufacturers. And they have been—have been or are currently on test in vessels who are members of this association.

Q. Do these devices involve overboard discharge? A. Yes, they do.

Q. That is because of the volume problem? A. Yes, I would say that is primarily it.

* * * * *

CROSS EXAMINATION by Mr. Carrier.

* * * * *

(47) Q. What is the length of the trip, please?

* * * * *

A. I was trying to figure miles for you. The normal round trip to Buffalo—in the grain trade, is that what you are asking?

Q. That was the question. A. Well, in the grain trade, it has a lot of time to it, as an example, because of the slow loading and slow unloading. The trip would be about twelve days.

* * * * *

(48) Q. All right, now, can you tell us the amount of flush water per man per day that would be required on these toilets? A. Well,—

Q. Let me— A. It would be an estimate.

Q. All right, sir. A. Because very few of the systems are separated enough to totally measure it, but I would say roughly one-third of that 125.

Q. Roughly 40 gallons; is that correct, sir? A. In that neighborhood, yes.

* * * * *

(49) Q. Okay, sir, now, taking the number of men that you have signified in your prior testimony and assuming the number as thirty men times forty gallons per man times the twelve days, well, what resulting gallonage do you get? A. I get—the exact numbers I get, 14,400.

* * * * *

(50) Q. All right, just roughly tell us, if you will, by converting, that twenty two forty long—I don't have the figures—at twenty two forty, how many tons do you have? A. You are obviously going to have about fifty tons.

Q. All right. Is that the weight of the holding tank that is required, sir? A. Well, that is the weight of the fluid.

Q. All right, now, how much is the weight of the tank proper minus the fluid, if you know? A. Well, I don't know exactly—

* * * * *

(51) Q. All right. Now, let me ask you one more question, Mr. Groh: In your opinion, if a fifty-ton tank, that being the weight of the liquid, how seriously would that affect the stability of the vessel, if at all? A. Well, it would depend on its location.

Q. Let's assume, sir, that it was located on the center line amidship? A. Low?

Q. Low, sir. A. Well, if it was low enough and the tank was fully pressed up, as a full weight, you had no free surfaces, for instance, at this point it would be an add on to stability.

Q. There would be no detrimental effect as to stability; is that correct? A. Not if it was so located.

* * * * *

(52) Q. In the biogest system, am I correct that the sewage wastes are placed in a collecting tank for fast settlement? A. The wastes go into one large vessel, yes.

Q. All right. A. One large tank.

Q. And then is it not true that the overflow goes into a second (53) vessel? A. That's right.

Q. And in that second vessel, as I understand it, it is aerated; is that correct? A. It is aerated.

Q. And then the wastes are fed into a third vessel or compartment; isn't that true? A. (Nodding).

Q. And then they are sprayed with chlorine; is that correct?

Judge Keith: Excuse me, sir, would you please answer because Mr. Cushran can't get that when you are shaking your head.

The Witness: Oh, yes, yes, that is the general description of the macerating—

Q. And I suppose if the chlorine treatment is effective, that is fine, and if not, the contaminated waste is put overboard; is that correct? A. Well, yes, the waste goes overboard.

Q. And if it is contaminated, it remains that way? A. Yes, if the plant has not been operating as it should, it does go overboard.

* * * * *

(55) Q. * * * Is it true, witness, that the Manitowac Ferry System utilizes a straight holding tank on their vessels, if you know? A. I have heard that. I do not know it to be a fact.

Q. And that the American Oil Company of Whiting, Indiana, has equipped the vessel Amoco Wisconsin with a complete sewage retention system including sewage, galley water, and sanitary water? A. I have likewise heard that but could not verify it.

Q. And that the American Oil Company have equipped similar retention systems on the vessels Amoco of Indiana and Amoco Illinois? A. That I do not know.

Q. And that The Munson, which is owned by U. S. Steel, is equipped with a G.E. unit, being an electro-mechanical incinerator. Do you know that? A. Yes, I know that.

Q. And that that G.E. unit is but eleven by seven by five feet in dimensions and weighs but 10,000 pounds or five tons? A. I believe that to be correct.

Q. And that that G.E. unit separates solids and incinerates them. Do you know? (56) A. I don't know that it—it still has an effluent, to the best of my knowledge.

Q. And, are you aware that on the Robinson, which is owned by U. S. Steel, that that vessel is equipped with the Zimmer-Hyde chemical, mechanical incinerator? A. Yes, also they have a liquid disposal problem.

Q. And is it not true that the Zimmer system consists of chemical treatment and filtration of the waste? A. It does. And then the liquids still have to be disposed of somehow.

Q. And isn't the effluent under that system passed through an evaporator for boiler feed water? A. That is one method of using the effluent, yes.

Q. And under that system, isn't the resulting sludge burned in the boiler? A. This is still in test.

Q. Well, I know all of these systems are experimental, sir, but don't you agree that that is the manner in which the Zimmer system works? A. Yes, it works on that concept.

Q. All right, sir. And are you aware, witness, that S.S. Consumers Power owned by the American Steamship Company has installed the Zimmer system? A. Yes.

(57) Q. And that Johnson Shipping, Limited, of Toronto, has completely fitted its vessels with self-contained toilets? A. What was that name again?

Q. Johnson Shipping, Limited, of Toronto. A. I have no knowledge of that.

Q. And that the Wisconsin-Michigan Steamship Company has installed total retention holding tanks on their vessel, The M-V Highway 16? A. I have heard that said.

Q. And that the electrical toilet known as Incineret-

Urinal has been installed on vessels of the Wisconsin Steel Company? A. They have some type of toilet..

Q. You are not even familiar with their system, are you? A. Not under that terminology as—what did you call it?

Q. Incineret-Urinal, sir. A. This is what company, International Harvester?

Q. Wisconsin Steel Company, sir. A. They have one vessel.

Q. They have one vessel with that system; is that correct? A. Not to my knowledge.

Q. Okay. A. That is not correct.

Q. Were you aware that total retention systems are provided on (58) six vessels of the Ford Motor Company? A. That they are planning?

Q. No, they are on. Were you aware of that? A. No, I am not aware of that.

* * * * *

(61)

RE-DIRECT EXAMINATION by Mr. Elder.

Q. Mr. Groh, you indicated you had some docks. Would you point out where that dock is, please? A. This dock is located at Detour, Michigan, in the lower part of the St. Mary's.

Q. Have you installed pump-out facilities? A. No, we have not.

Q. Why? A. Well, two very big reasons. One is that we would have no idea of what kind of size of piping, location of the connections on the dock face; we have no idea of what we are going to match up with. And then the secondary hold up is probably even primary in nature because there is no place to discharge the material after it were pumped ashore. If there is no municipal sewage treatment plant in (62) the entire area.

Q. So if you did have a pump-out station, there would be no place you could pump it—there is no municipal system? A. That is correct.

* * * * *

RE-CROSS EXAMINATION by Mr. Carrier.

Q. Did I understand from you, witness, that you testified that the treatment aboard the ship was commensurate with primary treatment, or did I misunderstand you? A. In connection with the older style, macerator-chlorinator—

Q. Yes. A. —as produced by American Ship Building Company,—

Q. Yes. A. —that is correct.

Q. I wanted to ask you, in the course of your education, do you have a degree in sanitary engineering? A. No, I do not.

Q. Then, basically, I mean, unless you had that competence, could you distinguish between primary and secondary treatment? (63) A. Well, it would be best left to others.

* * * * *

(65)

CLARENCE MCTEVIA, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION by Mr. Elder.

Q. Captain McTevia, what is your present occupation? A. I am retired now. Shipmaster.

Q. And what license of master? A. Master—

* * * * *

A. Master of all waters and Great Lakes pilot, from Cape Pinhead on Lake Ontario to Duluth in Superior.

Q. When did you retire, Captain McTevia? A. Just this spring, April 7.

Q. Of this year? A. That is correct.

Q. How many years experience have you had on the Great Lakes? A. 37 years.

Q. How long in the capacity of a licensed officer? A. Since nineteen—spring of 1941.

Q. How long were you a master, active master? (66) A. Seventeen years.

* * * * *

(67) Q. Now, I would like you to examine the chart of the Great Lakes and with respect to these vessels, show the relative trades of these respective vessels, starting first of all with the Carrolton. A. Starting on the Carrolton, then?

Q. All right. A. The Carrolton, she ran, carried pig iron from Buffalo to Saginaw, up into Saginaw. And we used to go up to Calcite and load stone for Republic Steel in Buffalo and go back to load pig iron again for Saginaw. That was the Carrolton.

In '55, I traded between Toledo and Ashland, Ashland, Wisconsin, carried bulk iron ore, it was confined to bulk iron ore until the fall of the year. Then the last seven trips I remember; the last seven trips we come out of port inland down to—down to Buffalo, down to Black Rock Canal, through Tonawanda.

Judge Pratt: Would you give the states in addition to the ports, please?

The Witness: All right, sir. Let's start:

(68) Buffalo, New York, pig iron, to Saginaw, Bay City, Michigan. Then we carried stone from Rogers City, Calcite, back to Buffalo, New York.

Then we go to 1955, on the flat decker. We carried iron ore out of Ashland, Ashland, Wisconsin, down to Toledo, Ohio. And then on the last seven trips we carried stone out of Port Inland, Michigan to Buffalo, New York.

Now we go into the self unloader in 1956. That was a dandy. We carried coal out of Sandusky, Ohio, for Toledo, Ohio, loaded coal in Toledo, Ohio for Detroit; and occasionally, we used to carry coal out of Sandusky to Erie, Pennsylvania. We had 223 loads that year. Fifty-six. Fifty-seven was the E. G. Maguire. That was practically the same. We carried coal out of Sandusky for Toledo, loaded coal at Toledo for Detroit, occasionally we took a load of coal from Toledo to Napier, Napier, Wisconsin. Then we would go across the lake to Manistique or Grand Haven and load building supplies for Sarnia, Ontario and Windsor, Ontario. Fifty-six, Fifty-seven.

Q. In '58, I was on the Ben E. Tate, basically with the same trade, between T[illegible]o and Detroit, Marblehead to Cleveland, Ohio. Fifty-eight.

(69) In '59, I was on the steamer Sierra. She was another self unloader. And we traded out of Grand Haven to Racine, Grand Haven to Kenosha, Wisconsin, yes, Wisconsin. Then from—carried building supplies, stone, sand and the likes of that. And occasionally we load bituminous coal out of South Chicago for Oak Creek, Wisconsin; then back again to Grand Haven, to Manitowa, Ludington. Most all of the—most all of the shoreline there of Michigan, almost all the ports.

Let's see, fifty-nine; sixty.

In sixty, I sailed the J. R. Sanzibar. We ran between south Chicago and Racine and I was in that trade there for two and one half years, a round trip every twenty-two hours, carrying coal to Wisconsin Electric, Oak Creek.

Then in sixty-three, I sailed the W. W. Holloway from Toledo to Detroit, almost exclusively between Toledo and Detroit.

And, let's see, then in sixty-five, I got the steamer Ashland and she sailed between Silver Bay, Minnesota to Buffalo, New York. That whole season, except for three trips to Toledo. That was in the first year.

(70) The second year, we started out the season between Silver Bay, Minnesota to Buffalo, New York and after about two and one half months, we started to carry coal from Toledo, Ohio to Buffalo, down the Black Rock Canal to Tonawanda and Periot, New York. That's right on the Niagara River.

Let's see, sixty-six, sixty-seven. In sixty-eight, that was a short season. We sailed between Silver Bay, Minnesota and Toledo.

Sixty-nine. Then, in 1970, the last season I was on, we dealt exclusively between Silver Bay, Minnesota and Toledo, Ohio.

I think I have covered all the Great Lakes, most every port.

(Whereupon Plaintiffs Proposed Exhibit No. 5 marked by the reporter.)

Q. Now, Captain, I would like you to look at this chart which has been marked Plaintiffs Exhibit 5,— A. Yes.

Q. —and you notice these various lines going up the lake and so forth? A. Yes.

Q. Would you please explain to the court what those lines are? A. Well, let's start out, start with Mackinac. These are (71) downbound courses. They are separated, the upbound and downbound courses. The upbound steamer, and in case of foggy weather, it keeps them separated.

This downbound, this is a thirty mile stretch here, you come on by, you come down here to 205,186, then you come, you dispatch yourself from Chicago, on by the gas buoy, most all traffic goes down there. Then they run either to Gary, Indiana Harbor, south Chicago and the likes of that.

Now, these are all upbound courses, all the four upbound courses from different departure points, but they all converge up here at Big Stable. They come upbound, off Point Betsy and come up around between Sleeping Bear, north and south Manitou—there is the North Manitou Light, up by way of Maisley Passage, up to White Shoal and then they join again at Straits of Mackinac.

Q. Now, you will notice these lines, would you tell us what the lines signify? A. All are separate courses, all separate courses, all indicate the—it says northbound, it's quite obvious; and it gives the courses and the distances.

Q. Aren't they sometimes called limits? A. No, I have never heard it referred to as limits. They (72) are—there is north, you know,—

Q. Well,— A. Northerly limits and easterly limits, you mean, well, you could say that.

Q. Don't you mean by limit, how far east or west you are supposed to go when you are on this course? A. You are supposed to stay right on your course, you know. You can drift off in case of bad weather in the fall of the year. It is not unusual for us to go right up along

the shore here, up either southbound or northbound, but you are supposed to adhere to these courses, that is, as close to them as possible.

Q. All right, Captain, I have a pair of dividers here. I want you to step down— A. Surely.

Q. All right.—and tell us, please, how far off the upbound course is from, we will say, Grand Haven, start with Grand Haven? A. Grand Haven. Let's take the course here out of Vern's Ditch, Vern's Harbor. Approximately 30 miles.

Q. You pass 30 miles from the shore? A. That's the easterly course, the one out of Indiana Harbor is even further, and from south Chicago is even further.

(73) Q. How far is that course off? A. The westerly course is 38 miles.

Q. How about Muskegon? A. Muskegon, let's take the westerly, just exactly 30 miles.

Q. All right. How about the point of Big Sable point? A. Forty-three miles off.

Q. Forty-three. You don't even have to measure that? A. No, it says so right on there, see.

Q. I see. A. You don't have to.

Q. How about the next point? A. Point Betsy, five and three quarters.

Q. All right. A. Statute miles.

(Whereupon Plaintiffs Proposed Exhibit 6 marked by the reporter.)

Q. Captain, I would like you to examine this chart that has been marked Plaintiffs Exhibit 6 and tell us what it is, please? A. A chart of Lake Huron.

Q. And would you indicate the courses on that particular chart? A. Starting at the Lake Huron Light, we have the B. P. O. location, which isn't on here. Starting with the (74) Lake Huron Light, we have the southbound courses. This is the southbound course, up right through here, up to Detour. This separates here at Lake Michigan. Now, leaving Detour, this is downbound, the downbound courses. Now, this here, we didn't pick this downbound

course out of Cove Island—it is separated. This here is the upbound to Cove Island.

Q. Now, on the downbound course, Captain, how far off Harbor Beach does it measure? A. Twelve miles.

Q. Twelve miles? A. Twelve miles.

Q. How about on the upbound? A. Upbound is five.

Q. Five miles off the Beach? A. Five miles off.

Q. Where is the next—how about up around Alpena there to here? A. Up around Alpena, you pass, I think it is—yes, four and one half miles off.

Q. So, at no time are you closer than four and one half miles to shore? A. No, no, no, not at any time.

(75) (Whereupon Plaintiffs' Proposed Exhibit 7 marked by the reporter.)

Q. Now, Captain, will you examine this chart that has been marked Plaintiffs' Exhibit 7 and tell us what it is, please? A. It is a chart of Lake Superior.

Q. Will you indicate the courses, the usual vessel tracks on that chart? A. The southbound course, starting at Whitefish Bay, on up to Manitou Island, Eagle Harbor, Outer Island, Devil's Island, and then this takes you into Superior, Superior, Wisconsin.

Q. How far off Manitou Island do you pass? A. Three and one half miles.

Q. And what is the other closest point you come to? A. The other closest point would be five miles off Copper Harbor or Eagle Harbor, that is the closest, and your five —four and three quarter miles off of this point. And you are only a mile and a half off of Whitefish.

Q. What is located at Whitefish Point? A. It's Whitefish Point Light and a coastguard station.

Q. Just a coastguard station there? A. Just a coastguard station, that's correct.

Q. There is no village or city there? (76) A. No, none right in that area, no.

Mr. Elder: Your honor, I would like to move into evidence Plaintiffs' Exhibits 5, 6 and 7.

Judge Edwards: Any objections?

Mr. Carrier: No objection.

Mr. Maslowski: No objection.

Judge Edwards: They will be received.

Is the point of all this, Mr. Elder, that any requirement of emptying these tanks would mean going off course?

Mr. Elder: No, your honor, we want to show that the—

Judge Edwards: Why are we being treated to this lesson in Great Lakes geography, then?

Mr. Elder: Because, your honor, all the cities, towns and villages along the shoreline discharge directly into the lake. All of these cities with one or two exceptions have just primary treatment.

Judge Edwards: I see. And you are going to show this later on?

Mr. Elder: Yes.

Judge Edwards: And that is your equal protection, I suppose?

Mr. Elder: Yes.

(77) Judge Edwards: All right.

Mr. Elder: Also, we are showing that the vessels, for the most part, are way out in the lake where you are getting greater dispersal of sewage rather than just a short pipe from the shoreline.

Judge Edwards: All right.

Q. (By Mr. Elder, continuing): Captain, did you bring some other charts with you of your own? A. Yes, on the desk there—no, that's not them, back there on the seat.

Q. Oh. You will have to put these in order, Captain. Start with the head of the St. Mary's River. A. You have got the St. Mary's River first? Oh, yes.

Mr. Elder: Could you mark this?

(Whereupon Plaintiffs' Proposed Exhibit 8 marked by the reporter.)

Q. Will you examine this chart that has been marked Plaintiffs' Exhibit 8, Captain, and tell us what it is. A.

These are my own private charts. I renew them every year. I put my own courses in. I do this so I can navigate in fog and radar. This is the head of the Sault River. Here is Gros Cap here and the International Boundary Line. This is the International Boundary Line right here.

(78) Q. Would you explain your course in relationship to the International Boundary Line there? A. Here is your International Boundary Line here, and I am on the—

Q. Now, Captain, the reporter can't get it down when you say up here. You have to refer to specific points. A. Oh, I see. As we go on Gros Cap, I am in the waters of United States jurisdiction. And as I come down to Round Island, the Round Island turn, I come back into the Canadian waters. Now I am in Canadian waters and I go around by Point Aux Pins. And after I leave Point Aux Pins, now I go down into the U. S. waters again and I pass way down here and I keep going down here through the Sault locks, down into the lower rapids cut, I am in U. S. waters all the way. Now, that's the first, that's the start of the Sault River. Do you want the next one down?

Q. Take the St. Clair River next. A. St. Clair River?

Q. Yes. A. Okay. This is Detroit. This is the St. Clair River, that one right there.

(Whereupon Plaintiffs' Proposed Exhibit 9 marked by the reporter.)

(79) Q. Captain, examine Plaintiffs' Exhibit 9, if you would, please, and tell us what it is. A. This is the head of the St. Clair River. It will take you down into the Flats, northend of Lake St. Clair.

Q. Please explain your courses in relation to the International Boundary Line, will you? A. The International Boundary Line runs more or less right down through the center of the St. Clair River until you get down to Stag Island. Then, well, you are here in United States waters and I always refer to the old channel, strictly in Canadian waters there.

Now you come down below Stag Island and we are still on the United States side until you get to the lower

end of Stag Island. And now we are back and forth, we are in Canadian waters. I would say we are probably in Canadian waters two-thirds of the time the rest of the way down to the St. Clair River.

Q. This is downbound? A. This is downbound. And upbound you are almost the same.

Q. All right, now, how about going upbound on the St. Clair River? A. Well, starting at the lower end of the Flats cut-off, this is strictly Canadian. Now you are in Canadian waters almost all the way up to Algonac. And here you see-saw **(80)** back and forth. First you are in Canadian waters and then you are in U. S. waters.

Q. How about on the right, way up the river? A. The rest of the way up the river you are mostly on the United States side. Occasionally you will move over when you get up to Indian Point, Port Huron. That's it, right at your left hand.

Q. Left hand? A. Yes. You might find they are the same, upbound and downbound.

Q. Yes.

(Whereupon Plaintiffs' Proposed Exhibit No. 10 marked by the reporter.)

Q. Now, Captain, I ask you to examine the chart marked as Plaintiffs' Exhibit No. 10 and tell us what it is, please? A. Detroit River.

Q. Would you explain the courses, both upbound and downbound with respect to the International Boundary Line? A. This is called the head of the Detroit River, the upper end of Belle Isle. You can see where the International Border Line crosses at the coastguard station. The coastguard station at the head end of Belle Isle is just inside, just on the side of the United States. Now we are in Canadian waters almost all the way down the river. **(81)** You see my courses that I have laid out here are almost dead in line with the International Boundary Line until we get down to Zug Island and then we veer off slightly to the right there. Then come down to the Fighting Island Channel and after we pass half-way down Bal-

lard's Reef, we are in Canadian waters again all the way down.

Q. Now,— A. At the head end of this, here is the downbound channel here and there is the boundary line here and we are in Canadian waters all the way down until we get almost down to the Detroit River Light where we go back into the United States waters.

Q. Now, how about the course on the upbound voyage? A. Upbound, naturally, this being a channel, you don't go wandering off much from the downbound channel, just to keep out of the downbound guy's way. But, after we pass the Detroit River Light, now we are exclusively in the—we are in the Amherstburg channel, all Canadian, all Canadian, up through here. Now we are up as far as the Livingston Upper Light, halfway up Ballard's Reef, back into U. S. waters again.

Now we are almost—then you are in United States waters until you get up to Zug Island, just above the Rouge River, the Rouge River cut. Now we are back (82) in Canadian waters. Going upbound, we try to stay in Canadian waters, just inside. We can't be over a quarter of a mile off the beach or else Canada is calling us up and telling us we are exceeding the speed limit. We are only allowed eight miles an hour, eight miles an hour, a quarter of a mile off. Beyond the quarter, we are allowed ten.

Q. Now, Captain, in the Detroit River, will you tell us how the current sets? A. Yes. Well, in the Amherstburg channel—

Q. Well, could you start up at the head of the— A. You want to come down?

Q. Yes. Come down the river. A. Okay. Here we have—we are coming from Peche Island, the front range is over here. We come down from here. We have a terrific setdown through here. All the current sets, you go right straight down through here.

Q. Could you tell us which way it is setting in relation to the next boundary? A. It is setting to the west. It is setting to the west here, until after we get in here and make lee on Belle Isle and then we more or less lose

this all the way down. You just stay in the center. You don't veer. The current all sets over to the lower side of (83) the river.

Q. You mean the westerly side? A. On the westerly side, yes. Then you come down into the Fighting Island North Light, your set is to the westward here also, extremely to the westward, you got a tremendous current going down through here. The ship just seems to want to go right sideways, you have got to be very cautious in making this turn here.

And now after we get to the lee of Grassy Island, the current is more or less right straight behind you, right straight behind you here. And in this case where the current comes down the side of the channel, is when it will set you over on this side. And then you come down into Ballard's Reef and here we have a tremendous set. It sets to the westward, southwestward. We have all this current coming down through here and it sets you to the westward here.

Now, in the case of entering the Livingston channel, here we have a current that just seems to want to keep passing right straight down to the Amherstburg channel so we got to be very cautious here.

Now, you come here, you are going towards the east, towards Canada again. Now, we pass down through the Amherstburg (84) channel, the Livingston channel. Now, the current, after we pass through the dikes, will start you to the east again, well, naturally, because the flow is around in this way, down to the eastward.

Q. Will you look at Plaintiffs' Exhibit 9, Captain, and would you tell us how the current sets in the St. Clair River with respect to the International Boundary Line, you see, from Canada to the United States, and so forth? A. Okay. Coming downbound through the rapids, this is the Port Huron Rapids, where the International Boundary Line is, right down through the center. The current here is in all directions. It's a regular whirlpool, right in this area here. But down here is a strange thing. This current comes down and it sets backwards and comes up around

here, like here, and sets all the way up in here, up to the bridge here, it goes in the opposite direction, where on one side you might have a current of three and a half or four miles an hour here, but over here, it's the reverse, coming backwards, trying to get in here is very difficult. The current is all, goes up inside here.

Now, let's go down past the traffic buoy. The current is more or less down through the center of **(85)** the river here. It will split here. There is quite a current comes down and it sets eastward, more or less wants to come down toward the Canadian side. Then we pass down through St. Clair, the current is more or less right behind you. Now, we come down here to Recourse Point and this is the area where I live, right in here, and I watch the ice flow, and this ice goes down, right down inside this—stays right close to this beach.

Q. Which beach is that, Captain? A. This is the beach, you know, this is the east Chandler township area between Recourse Point and Marine City. Now the current is more or less right behind you until you get down into, by Algonac, and here the river splits, the north channel and the center channel, north and south channel. In here we have a tremendous current, here the current sets to the west. It follows this old channel. The channel is down through the south channel, through here. Until we get down to southeast pin Light Point. Now, the river is divided. This is the old southeast bend channel. This has been dredged out. There is a tremendous current goes through here and the ship wants to set right down on this point. So you have to hold up. The current is all going to the **(86)** westward.

Q. Then, generally, is it true, Captain, that the—the majority of the river, the current sets to the side, from the Canadian side to the American side? A. Yes, yes, it does, uh-huh.

* * * * *

(89) Q. Now, Captain, assume that you were to require every vessel passing through the Detroit River to stop and pump out holding tanks, what would happen?

A. This is—this is really ridiculous. It couldn't possibly—you would have a backup clear to Buffalo. You would have steamboats waiting hours on end. I know what it's like because I had to stop at the Consolidated Fuel to put on fuel. It takes us about an hour or an hour and ten minutes or an hour to put that fuel on there. In no time, there will be four or five boats backed up behind you waiting to put fuel on.

Q. What would be the situation if you had a pump-out station there, we will say, at Benton Harbor—not (90) Benton Harbor, but Muskegon? A. This is another ridiculous—this is impossible. You couldn't possibly work it out. You would have boats again backed up, all that stuff out, all those steamers out of Chicago, Indiana Harbor, Gary, they would be all backed up there. You couldn't—no, it's not—it's ridiculous, to even think of it.

Q. So, if you did this, you would actually be taking sewage from vessels in other states and putting it into Michigan? A. Exactly, you would be going from Illinois, Indiana and Wisconsin into Michigan and dumping it, dumping the sewage.

* * * * *

(91)

CROSS EXAMINATION by Mr. Carrier.

Q. Captain, you signified on your exhibits there that you had set certain upbound and downbound courses; is that correct? A. Yes, that is correct.

Q. And isn't it true that those courses are only recommended as distinguished from mandatory? A. They are my own courses. In the rivers, we have no designated courses by lake carriers.

Q. So that there are no mandatory upbound and downbound courses; is that correct? A. We must stay in safe waters, that's all.

* * * * *

(92) Q. Let me ask you this: As you transit the Detroit River waters, do you shut down the sanitary system? A. No.

Q. And, certainly your responsibility in navigating a ship doesn't have to do with whether someone is using the urinal; is that correct? A. No, definitely not.

* * * * *

Q. Okay. Now, if you did pump out at the twelve mile limit, twelve miles off shore, isn't it entirely possible that your sewage might be picked up by a passing vessel? A. I suppose, if there is one close by.

Q. Yes. And isn't it true, sir, that some vessels on the open waters of the Great Lakes do in fact draw in water for drinking purposes? (93) A. That is correct.

* * * * *

(94)

HARLOW B. MENO, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION by Mr. Elder.

* * * * *

(105) Mr. Elder: I asked him if he had made any calculations as to the size of holding tanks that would be required on an average Great Lakes vessel, considering the variety of trade.

Judge Edwards: Well, you can answer that question, Mr. Meno, and I guess you can answer it yes or no. Have you made such calculations?

The Witness: I have.

Q. Would you tell us the results of your calculations, please?

Judge Edwards: I think we will let the witness testify.

A. Well, I figured that a tank about roughly ten by twelve by fifteen feet, which is 18 hundred cubic feet, which would hold roughly 13 thousand five hundred gallons forward and aft, should satisfactorily, under normal circumstances, and without unanticipated and accidental delay, suffice as a holding tank for the normal operation of

a ship. Now, that would be two tanks, roughly ten by twelve by fifteen feet, one at each end of the boat.

* * * * *

CROSS EXAMINATION by Mr. Carrier.

(109) Q. And on, let us say, the South Chicago to Muskegon two-day run, you wouldn't need a very large tank, would you? A. Well, if you were trading—if you were trading regularly South Chicago to Muskegon, or if you were trading regularly from one stipulated port to another stipulated port, and in the trade of that sort, why, then you would just have to figure as to how many hours you were between docks—

Q. Yes, sir. A. —and how many hours it will be to complete a round trip.

Q. All right, sir. Now, you indicated that the fittings aboard ship and the fittings at the emptying facility had to coincide; is that correct, essentially? A. Yes.

Q. Would there be any reason why you couldn't dump the sewage into an open manhole that is connected with an existing sewer system? **(110)** A. Oh, no, no, you could pump into that as well as anything else.

* * * * *

(112)

CHARLES SPOONER, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION by Mr. Elder.

Q. What is your occupation, Mr. Spooner? A. I am chief engineer of the marine consultants and designers, a firm of naval architects and remodelers at Cleveland.

Q. What is your educational background, Mr. Spooner? A. I was graduated from the University—or, Cornell University in 1934 with a degree of mechanical engineer; and in 1935, a degree of Master of Science in engineering from the University of Michigan.

Q. Have you had any experience teaching? **(113)** A. I taught at the University of Michigan from 1936 until

1953 in the department of mechanical and then mechanical and marine engineering.

Q. What did you do after you left the University of Michigan? A. I went to the Great Lakes Engineering Works, which is a shipyard in River Rouge, Michigan, as assistant chief engineer at that point for a matter of three years or so; and then became the chief engineer of the yard.

Q. What was Great Lakes Engineering? A. They used to have a variety of terms applied to them, but, generally, it was a repair yard in lean times and it was a building shipyard and construction shipyard in good times.

Q. Approximately how many ships did you build there while you were chief engineer? A. During the period 1956 to 1960, we constructed three new vessels, two of which were maximum size.

Q. After you left Great Lakes Engineering, where did you next get employment? A. I went over to Cleveland and joined the firm of Marine Consultants and Designers, which was at that time called H. C. Donner Associates.

Q. Tell us briefly what does a firm of naval architects do? A. We are involved in new ship construction and ownership (114) reconstruction and conversion, changing the nature of the—depending on the changing nature of the trade—new construction would be a matter of, in the past nine years, since I have been with the company, a little over nine years, we have constructed about nine new vessels in various yards—gulf coast, east coast, one in Ireland—and we are involved at the present time with two new ships on the Great Lakes.

Q. Now, you say you are involved in construction. You don't mean the actual construction itself? A. We are responsible—we were responsible in one vessel for the contract plans and specifications and have been consulted since that time upon occasion in connection with the development of the design by the shipyard, did the detail work—I am speaking of the new U. S. Steel vessel which is currently building at Lorain. The other vessel is the Stewart J. Court, which is the new thousand footer constructed at Erie, which is nearing the final stages of com-

pletion. On this vessel, we were responsible for the entire detail design as well as the preliminary.

Q. You actually designed the vessel? A. That is correct.

Q. And what are the dimensions of those vessels, Mr. Spooner? **(115)** A. The U. S. Steel vessel is 858 feet by 105 foot beam. The depth, I am not quite sure of, but it is about thirty one and a half feet. The Stewart J. Court, which is the Litton—Litton built for Bethlehem, is one thousand feet overall length, one hundred and five foot beam and a forty-nine foot depth.

Q. What type of sanitation devices are being provided on those vessels? A. Both of these vessels are provided with the American Ship biogest units of their latest design. The equipment for these vessels was selected approximately, I guess, three years ago. Both are under contract for some such period as that.

Q. Now, if you were requested to make a calculation or design and installation for holding tanks for Great Lakes vessels, what elements or factors would you consider? A. We would begin with the length of the proposed voyage, the number of personnel aboard, the expected speed of operation, in other words, the overall elapsed time is of the essence as far as the particular part of it is concerned. The size of the holding tank would be, to my way of thinking, equal in size to the fresh water tank **(116)** or greater, depending on the method of operation.

Q. What about contingencies such as storms or fog or delays, such as the failure of open locks, that type of thing? A. It certainly should be provided for. I would gather that you are getting at the size of the fresh water storage tank and therefore the size of the holding tank. The quantity of water which we have been using in the last several years is in the order of 40 thousand gallons for a vessel that will have a five or six day round trip, based on four thousand gallons per day, which in turn is based on approximately thirty to thirty-five men.

Q. Now, have you made a calculation such as you have mentioned here with respect to holding tanks? A. Well, if we are expected to hold the entire quantity of

water which would be coming to us in the period of, say, five days, or six days, if that is the normal round trip, it would be—it has to be somewhere close to the same volume that is stored in the potable water tanks, or, if it is not stored there, it has to be—potable water, can, of course, and is picked up out in the open lake, in clean water, and put into these storage tanks so that conceivably your holding tank must be bigger than your water storage tank.

* * * * *

(117) Q. Mr. Spooner, I ask you to examine Plaintiffs' Exhibit 14, marked for identification 14, and tell us what it is please? A. This is the capacity plant which is prepared by Great Lakes Engineering Works for a vessel, No. 301, which is the Edmund Fitzgerald, being the first vessel built with 729 feet overall length and 75 foot beam, which is at that point the maximum size that was to be permitted through the MacArthur Lock.

Q. What size capacity tank did she have for water? A. She has very close to twenty thousand gallons aft and twenty-two thousand thousand gallons forward in the potable water tanks.

Q. Would you point out those tanks, please? A. This is the forward one in the dark hold and this is the aft one underneath the fuel bunker.

Mr. Elder: Your honor, I offer this in evidence at this time, just to show the relative size of (118) these particular tanks to the vessel.

Judge Edwards: Any objection?

Mr. Maslowski: No objection.

Judge Edwards: It may be received.

(Whereupon Plaintiffs' Proposed Exhibit 15 marked by the reporter.)

Q. (By Mr. Elder, continuing): Now, Mr. Spooner, I hand you a document marked Plaintiffs' Exhibit 15. Would you examine that and tell us what it is, please? A. This is the midship section drawing for hulls at Lorain, 867 and 868, which respectively are the steamers Philip R. Clark and Arthur M. Anderson.

(Shows Proposed Exhibit to opposing counsel.)

Q. Now, Mr. Spooner, if the owners were to request you to install holding tanks, where would you recommend they be placed in the vessel? A. In this particular series of vessels, it is conceivable that the holding tanks could be placed within the side tanks as individual tanks, constructed that the hull structure can be examined all around, and, hopefully, that they could be piped which would mean really that you would have to have four tanks in the vessel, two forward and two aft, adjacent to the quarters; and also adjacent to the locations where the pumps could be used **(119)** and the piping connected.

Q. Would you indicate on that drawing, please, that exhibit, where the side tanks are? A. To you, or to the court? (Turning to bench.) The side tank is this area here. This is the top of the tank. The bottom is connected to the inner bottom tank here. There is no subdivision between the two. And it is conceivable that in an area such as this or an area such as this, the tank, or the series of tanks could be constructed. If it is in a constricted area, the tank would be of an odd shape and it would be constructed most expensively—very expensive to build because of the location and the shape. The other locations, then, of the side tank, would involve considerable change in the vessel itself to be able to maintain the capability of handling cargo in the normal fashion.

Q. Would you actually take a pencil and indicate on that exhibit where those side tanks are? A. Yes, sir. (Complying with request.)

Q. Now, how does this vessel compare with the older vessels built between, say, 1907 and 1940? A. With respect to the nature of the structure?

Q. Yes. **(120)** A. Primarily, the structure is today, or at this time, because actually, these vessels were constructed in 1952. At the time that they were constructed, the change had pretty largely taken place from riveting to welding. There is still a fair amount of riveting in the seams of the shell, but the—outside of being larger and being refined in some details and designed around the fair

amount of welding, the midship section of an older ship does not look very far different from this.

Q. Was that with respect to side tanks? A. With respect to side tanks and the bottom side shell arches, which is what is shown on this print.

Q. Now, would you recommend such a holding tank installation? A. I would hope that there would be some other way to build them than to put in holding tanks at this location in this type of vessel. I do not recommend the use of side holding tanks, no.

Q. What would you recommend? A. I believe that a well designed treatment plant can produce a satisfactory grade of effluent such as to cause no more difficulty or nuisance than current systems that are used in municipalities.

Q. Are there such systems available for vessels? (121) A. There are.

Q. Now, what are they—let me strike that. Would it be feasible, Mr. Spooner, to have an installation such as the biogest system with later holding tanks that hold the treated effluent so that you could prevent discharge in ports and congested areas? A. Yes, I would say that would be a very feasible way to do it. The treated material coming from these units could be stored for a reasonable length of time in such tanks as the ballast tank, if that would be agreeable.

* * * * *

(122)

CROSS EXAMINATION by Mr. Carrier.

Q. Were you present in court this morning, witness, when we discussed the biogest system as a three-compartment system? A. I believe I heard that statement made.

Q. Can you tell me whether or not the biogest system, the three-compartment system, would in fact be larger than the holding tank you propose here? A. The biogest system, I do not believe, is a three-tank holding system or a three-tank system. It consists of a multiplicity of passages and tanks. The sludge material along with

the after maceration is recirculated and is reinjected time after time until the sludge is digested. There is a very small amount of solids that are in suspension carried on and when it is finally gotten to the last tank, it is chlorinated and there is a timing device that holds it until chlorination has been able to destroy a large percentage of the coliforms, and from there it is pumped over into a proposed holding tank such as mentioned here. The size of the unit is roughly six feet by eleven feet in base, but about six and a half to seven feet tall, for a piece of equipment that can handle approximately 50 men.

* * * * *

(127) Judge Edwards: Mr. Spooner, before you leave the stand,—

The Witness: Yes, sir.

Judge Edwards: —I would like to ask you a question or two. It seems as if the thrust of your testimony is that if you had to do something about the pollution problem arising from shipping, that you would prefer heading toward the idea of an internally contained treatment plant on shipboard?

The Witness: Yes, sir.

Judge Edwards: Is that correct?

The Witness: Yes, sir, that is correct.

Judge Edwards: As a matter of fact, that would end up being more expensive in terms of capital cost and operation than the holding tank problem absent the layout problem, would it not?

The Witness: It would be my opinion that it would be very much less costly to put a treatment plant aboard the ship.

Judge Edwards: Why?

(128) The Witness: The units cost in the order of magnitude of twelve to fifteen thousand dollars per unit; and in the vessel of this classification, it would require two units. You are into about 25 thousand dollars for hardware, something like this.

The piping already exists in this particular vessel connected to the central tank so it would be a mat-

ter of replacing the very rudimentary unit that is presently in and putting in the new biogest system. The total cost to the vessel would be something, I would guess, around 50 thousand dollars.

To put in a holding tank of suitable size, which I am predicating on this physical size of the fresh water tank, I would be willing to estimate that as 125 to 150 thousand.

Judge Edwards: Is this simply because of the additional size?

The Witness: There is a fair amount of steel involved and it is located—it would be located in the ship in a very awkward place to get at. It would be very costly to put in, the steel of the tank, to put in the welding and construction in such a confined location.

Judge Edwards: What are the comparable sizes, roughly—is it two to one, four to one?

The Witness: Per cost?

(129) Judge Edwards: No, in terms of the actual size of the tank units involved in the treatment tank facility and the holding tank facility?

The Witness: The treatment tank facility, as I mentioned, is around five and one half to six feet across and ten, eleven feet long and six and one half feet high, approximately, the size of it. The holding tank in the location such as this, if we do it the way my sketch showed it originally, would be eight and one half feet tall, which is the available space vertically. It would be an average breadth of about five feet and in order to contain with one tank, to contain ten thousand gallons, it would have to be thirty-five feet long.

Now, there is that space in the tank, in this side tank, but you have to have roughly four of these things to get up to the volume that you have in your fresh water tanks. There are other ways to do it, most of which would be equally expensive—other places to locate the tanks.

* * * * *

(131) Judge Edwards: Might I ask another question of you, Mr. Spooner: Since the probability is strong that you are not one of those who has to crawl through the ballast tanks, what is your view as to whether or not it is feasible under some circumstances to use ballast tanks for holding tanks?

(132) The Witness: Why, I have been there. I have done it. And I would certainly hope I would never be asked to go in one that had been used for a container like this.

Judge Edwards: I don't think that would be a good answer, but does that mean that under all circumstances you would have to do that?

The Witness: No; I would say that your—if you put raw material in against the hull structure of one of these vessels, you would be asking for some serious trouble because I would not anticipate anybody would care to examine things very closely. There are many places where sludge and other material of that type would hang up and would create a very unpleasant, at the very least, situation in the tank.

Judge Edwards: Well, really, this may be perfectly obvious to you, but the Act says that under all circumstances there has to be inspection of the—

The Witness: The hull structure.

Judge Edwards: —the ballast tanks?

The Witness: Yes, sir.

Judge Edwards: All right. That is what I really wanted to know.

* * * * *

(133)

RE-CROSS EXAMINATION by Mr. Carrier.

Q. Let me ask you this, please, Mr. Spooner: With the holding tank, there is essentially nothing mechanical that can go wrong; isn't that true? A. Except the settling out of the solids to the extent where they may be difficult to dislodge and also except for the fact that improperly operated, without any mechanical devices, you must depend on a fair amount of chemical added to maintain the material in a not too suitable septic condition.

* * * * *

(137)

JOHN E. KINNEY, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION by Mr. Elder.

Q. What is your occupation, Mr. Kinney? A. Sanitary engineer consultant, self-employed.

Q. Where do you reside, Mr. Kinney? A. Ann Arbor, Michigan.

Q. What is your education? A. Bachelor's degree in civil engineering with a major in sanitary engineering, in 1941; Manhattan College; Master in civil engineering with a major in sanitary from Cornell University, 1942.

Q. What has been your experience? A. I have worked with the New York State Department of Health, with the—in the United States Navy, CB's, in water supply for the Marines; and with utilities in the Philadelphia Navy Yard; for a consulting engineering firm in Spitzberger, for five years with the Ohio River Valley Water Sanitation Commission, the Eight-State Compact to clean up the Ohio basin; and since 1954 I have been self-employed.

Q. Was all this experience you just described in connection with sanitary engineering? A. Yes, in the broad scope of water management, water supply, (138) waste disposal.

Q. Are you a registered professional engineer? A. I am in five states, including Michigan.

Q. In what states, please? A. Michigan, Indiana, Ohio, Pennsylvania and New York.

Q. What professional societies do you belong to? A. Several, including the American Society of Civil Engineers, the National Society of Professional Engineers, American Society of Testing Materials, American Water Works, Sewage Works and some others.

Q. By whom are you generally employed in your consulting work? A. Principally with industry, but I have been and am acting as a consultant to state agencies, to municipalities, to civic groups and am on the Interior Department's Advisory Committee on Water Data for Public Use.

Q. Before what Congressional Committees have you appeared? A. Before the House and Senate Public Works Committees, the Government Operations Committee, Interior, working with the House Public Works Committee in an advisory capacity to the majority and minority on legislation for the last six or seven years.

Q. To what publications, if any, do you contribute? A. Well, presently I am a contributing editor to INDUSTRY WEEK and INDUSTRIAL WATER ENGINEERING.

(139) Q. What is it—what is that publication? A. The—in both of them, they are both trade journals for—the one for industrial management, the other one for people who are active in the water management field, either supply, re-use or as treatment.

Q. Now, you indicated your field is sanitary engineering. What does that encompass? A. Well, in the broad scope, it covers the scope of all the areas that are related to the health of man, it includes water, air, land disposal, rodent control, disease factors and while I stay on a peripheral activity in the others, my role is essentially in the water end of it, but the decisions in air or decisions in water or decisions on land affect the others. They are not able to be separated.

Q. Now, what is the basic purpose of pollution con-

trol and how is it defined in terms of standards? A. The purpose is to provide for the utilization of resources, to protect the uses that are deemed in the best public interest. We are using water as such as a resource for health, for public water supply, for recreation, fisheries, for navigation, industrial water usage. The idea is to determine the usage that is to be protected and then the definition of the standards of quality necessary to protect those uses and then develop an implementation **(140)** plan to achieve those objectives, which is essentially the heart of the and the objective of the Federal Water Pollution Control Law and the state law.

Q. Now, how does one relate performance standards to the standards designed for the protection of water uses? A. Sometimes that can be quite difficult. The idea is to develop the quality that is needed in the receiving water for the protection of the use and the normal degree of treatment that would be necessary for individual sources of waste that would achieve those objectives. Sometimes for administrative purposes or administrative ease, we reduce these standards down to uniformity of discharge or control at point of discharge. The difficulty, though, is that once that is separated from the stream standards as such, there is never a guarantee that achieving that objective will accomplish the result you want.

It also works the other way. You can go too far on a performance deal and actually provide a prohibition on a discharge. You may accomplish the protection of the water use you are looking for but you end up paying a penalty by interfering with other—with some other use, or additional cost. It may cause an air pollution problem; it may use additional cost of money that could go into better advantage **(141)** in other areas of the environment.

Q. Now, public law 167 of Michigan was adopted to protect the waterways of Michigan. Does it in fact? A. In my opinion, it really doesn't. It can under some circumstances. It can also cause difficulties under others. The principles on which we are operating with waste

treatment is to provide something that will be reasonably reliable, be able to provide a degree of treatment that will protect the usage and then where possible provide for further advantage to dispersal types of devices. What we are looking for is to maintain a minimum concentration. When you collect waste on a ship and bring it ashore, actually what you are doing is concentrating it further at a given point. Our pollution problems are essentially along the shore. They are not out here in the water.

The problem then, by bringing it ashore, you further increase the requirements necessary for treatment on shore or at the shore before they can be discharged. For small vessels, for small boats the matter of convenience of collecting them on the ship or in the small boat and bringing them ashore is reasonable.

On small inland lakes, it is highly reasonable to prevent any kind of discharge in the waterways, but when **(142)** it comes into the larger activities, the objective is to accomplish the quality of treatment, the water quality desired as quickly as is possible.

When the administrative rule which calls for acceptable treatment devices was changed in the law to eliminate that and limit it totally to holding tanks and/or incineration, it meant that until such time as equivalent treatment devices are provided on shore, instead of accelerating pollution abatement from ships, we are actually delaying it because we are bringing the wastes ashore to a point to provide for treatment that now does not exist.

Q. Are there pollution control devices used on land or ashore comparable to the biogest system? A. Yes, one of the big difficulties that we have had in pollution abatement has been to develop these facilities that could be used for small installations, a small number of homes, a shopping district, small resort area; and the trade has developed a package unit that for all practical purposes holds the sewage long enough to burn it up, to reduce the organic matter down to the point where it is mostly ash.

These facilities are used on shore. They discharge into very small brooks. They are permitted under state

law in areas that are recreational areas. And I have (143) personally experiences, controls and checks in areas where these residual streams is practically the total flow from one of these that went down to a park where children were playing in, because while there is still a bacterial count, the time is long enough so that the pathogenic count which carries the disease is pretty well burned out. If there is chlorination in addition, why the chlorination will assure the final destruction of the pathogenic bacteria.

And, actually, the application of a similar type unit then on ship should be identical in principle, as what you are going to be doing is providing a facility to make a water that is acceptable for quality that is not noxious, it is not unwholesome. It seems to me as though the equities would require the same kind of treatment devices in both places. Since putting these on ships can be done much faster and accelerating the program rather than wait for the on shore treatment to build up to it, we would take care of the pollution from the vessels much faster than by taking that route.

Q. Have you seen the biogest system? A. Yes, I have.

Q. Would you describe it for us? A. It is a self-contained unit which is about six by ten or (144) twelve, some seven or eight feet high, six or seven feet high. It is a series of cells wherein the waste water is put through a grinder, a comminuter type operation, tears down—tears down the heavier solids into small particles, and then by re-cycling it, you build up the biological activity in there that actually converts the organic matter over to carbon dioxide and water. This is the same principle that we have in the activating sludge plants for the large cities or these package plants for small communities. By holding it in there, if it is properly designed and operated, the residual discharge is going to be uniform day in and day out.

Now, as far as the operation is concerned, one of the requirements when the trade was working on the units for small communities or small groups, or areas, was to recognize that you are not going to have qualified operators

running a plant at all times for each community, as, I mean, for a shopping district, so that what you want to do is to build in something that is virtually fail-safe. These are. Some states require a meter or actually a recording meter on the device so that they can go around to check it to make sure that the motors have been running through the whole period of time. As long as they run, the results are going to be acceptable.

(145) Q. Now, Mr. Kinney, it has been suggested that these vessels could use their ballast tanks as holding tanks for raw sewage. Do you have any comment on that? A. One of the difficulties that we encourage (sic) in municipal treatment units is the accumulation of organics in—against metal surfaces. Even though the solution may be aerobic, the contact between metals and the solids goes anaerobic which means that there is no oxygen present. The decomposition of that product is exceedingly acidic and you begin to have considerable deterioration and corrosion of the metal.

To take a holding tank in a ship which really wasn't designed for easy flushing or cleaning, to allow the settling, the material to be standing in there for a period of time would mean that the solids would settle out. While you might be able to pump them, pump out the bilge water that might be in there or replace it with other water, unless there was an actual inspection of it and a thorough flushing each time, you could well have settling solids that over a period of time would give you the corrosion that you are not interested in obtaining, taking much of a hold on the bottoms of ships.

Q. Is there any particular health problem in connection with holding tanks? **(146)** A. They can be controlled by the amount of chemicals that are added, but when you add chemicals to maintain odors, you can also find that if your ship is going to be running for a longer period of time than expected, the waste waters become quite septic. The health may not be impaired but the odor is such as would give rise to objection.

Then there is another possible difficulty, too, and that is in order to keep the bacterial activity from really gen-

erating in there, to give off gas, and unless this control is maintained—incidentally, if it goes anaerobic, the gas that is given off is a combination of methane and carbon monoxide which is explosive. We have learned the hard way that you have to design sewage treatment facilities to prevent—to anticipate the possibility of an explosive mixture.

But assuming that you could maintain the quality so that the explosive mixture didn't develop, which would mean that you would be adding some type of a bacterial static chemical to bring about bacterial action. Comes the day when you pump direct into the municipal sewage treatment plant, the sewage treatment plant will receive a slug load. The city of Detroit could well dilute it out. This kind of waste discharge into a small community, particularly if they had secondary treatment, would disrupt **(147)** the operation of the treatment plant.

One of the biggest difficulties that we have in communities are small industries or laundries dumping batch loads. They do upset the municipal plant. I would hate to see a program established that would actually promote operating difficulties by bringing these slugs into the small community, and 40,000 gallons out of a ship would be a slug load or it could even be a slug load for the city of Detroit, depending on how close to the sewage treatment plant it is discharged.

Q. What is primary treatment? A. Primary treatment is—provides for the precipitation of solids that will normally settle within two hours retention time, because, you know, everything organic uses about one third of the oxygen demand of the waste water and it may or may not be followed by chlorination for sterilization purposes.

Q. What is secondary treatment? A. Secondary treatment, the solids in sewage are about one-third soluble and one third colloidal—very fine—that could be precipitated with chemicals—one third of them will dissolve. The secondary treatment is taking the effluent from this primary settling and adding a bacterial action **(148)** to try to tend to destroy the colloidal and dissolve solids.

Q. Can you equate the biogest in terms of whether it is primary or secondary treatment? A. The package aeration units are considered secondary treatment and with the data that I saw from the public health service review, we are checking on these, on actual shipboard operation. It qualifies very nicely as secondary treatment. There is about 85% removal of the organic matter.

Q. Taking a few of the port cities around the lakes, Mr. Kinney, such as Detroit and Muskegon, what is the status of their waste treatment program, do you know? A. From talking with people at the state on the status, we are into the area yet of primary treatment or with the addition of chemicals for chlorination, and directed towards a secondary treatment program, but there are some very real delays in the financing of them.

Q. What type of treatment does Detroit have now? A. Detroit has the equivalent of primary treatment but they are starting in on a construction program to go towards the secondary. Mr. Remus was complaining this noon to the federal administrators that they are not getting the money that was intended to carry. So there is a real question **(149)** whether it would be the equivalent of secondary treatment.

Q. You don't know when Detroit will have the equivalent? A. (shaking head negatively)

Q. What is the particular pollution problem in the Detroit River as far as Detroit is concerned? A. Well, there is much talk about the effect of the Detroit wastes on Lake Erie, but if we take a look at the pollution problem in terms of the solid load, in terms of the—which can settle in the river and cause considerable sludge deposits, the organics which can consume oxygen and the nutrients which can encourage the bloom of algae, the primary plants take care of the sludge deposits. The Detroit River really doesn't have an oxygen problem whatsoever as long as the secondary treatment here won't make a change in the river whatsoever.

The third part, to go after the nutrients level, since Detroit will still be discharging at a point into the close

to shore waters, even with a ninety percent reduction of phosphates, the nutrient concentration will still be high enough to trigger a bloom. This is one of the ironies of designing according to regulations. They could disperse it across the river and accomplish the protection of the downstream river at a much cheaper operation, but it is the same **(150)** principle in terms of dispersal from a waste treatment as from a device, as long as it is away from shore, or a ship.

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(153) Q. (By Mr. Elder) Can you give us a definition of sewage? A. The definition in the sanitary engineer's field is the waste from the—domestic sewage is the waste from humans, galleys, commercial establishments and homes and if takes all body wastes. It is a quality in water such that it would impair use. It is definitely untreated or inadequately treated, but treated sewage is not sewage. Treated sewage is an acceptable water supply. And that's **(154)** where I differ with the definition that is maintained in Public Law 167 where sewage is human waste, whether it is treated or untreated. If it is treated, then it is no longer sewage, if it is adequately treated.

Q. This is my last question to you, Mr. Kinney: Would a properly designed and operated biogest unit or some similar biological unit providing treated water which is—which if discharged into the waterways, would be such as to prevent it being rendered noxious or unwholesome otherwise?

Mr. Carrier: Oh, I think that calls for a complete legal conclusion, your honor, definitely.

Judge Edwards: Noxious or unwholesome—the only thing that I can see that is objectionable about that is that I won't know what noxious means, either, which is the objection that the plaintiffs are making. I think we will let him explain his opinion on this.

The Witness: Very frankly, with this kind of treatment, if it doesn't render it as acceptable so that it is no longer noxious or unwholesome, we are in a

real exercise in futility, in putting in these waste treatment plants. Very frankly, the operating, tightly-operated (155) waste treatment plants do render water acceptable and not noxious or unwholesome.

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CROSS EXAMINATION by Mr. Maslowski.

Q. Mr. Kinney, just what is wrong with, say a ship containing its sewage in the holding tank as far as a pollution control device is concerned? A. It will depend on whether or not the device is such a ship as the Bob-Lo which stays close to port, short hauls, if the holding tank is properly designed so that it won't have the accumulation of solids and has got a quick pump-out, I would think that would be an excellent device, but as far as being a total remedy, I think that the other devices are much preferable and I think the damages or the difficulties that are inherent in the holding tank are not all answered.

(156) Q. Well, what's wrong with a holding tank, for example, let's be specific. A. It's difficult—I thought I had been before. Holding tanks, if the purpose is to provide an acceptable water quality, the purpose of the whole treatment device is to provide a water that is acceptable for quality, and if the idea is to accelerate that acceptable water quality, there are other devices and other means available that can do exactly the same thing that would be preferred, but in terms of the holding tank itself, if a holding tank can be small, easy pump-out, and relatively frequent pump-out, the holding tank in itself would have no difficulty. Holding tanks for small boats make sense.

Q. How small of a boat are we talking about now? A. Talking about the size that would not have mechanical capacity on it to be operated continuously or if the operating activity of the boat would be intermittent.

Q. Doesn't a holding tank have this advantage, that the sewage that is generated aboard ship is discharged in this holding tank and it is kept there and then finally the ship gets to a selected point and it discharges that sewage

at that selected point—isn't that the advantage of a holding tank? (157) A. I think that's one of the real disadvantages.

Q. Why? A. To put 40,000 gallons from one of these into a small municipality in terms of the treatment plant, I would hate to be the operator of the plant every time you dump.

Q. Aren't you making an assumption that every time— A. Uh-huh.

Q. —that they are going to unload the holding tanks, that it is going to be in a small treatment facility and there is going to be some kind of disadvantage? Let's assume that we have a good treatment plant. What is the disadvantage going to be then? A. Only—I am not arguing about it being good treatment. I am fully expecting you are going to have good treatment in all communities. What I am arguing here is that this unit, once it is established as a requirement, should be available to be dumped in any port that you reach.

If you have got the possibility of diluting out, large volume, such as in Detroit, then you would have an answer, but in terms of the small town, to bring this kind of a slug around, you hold it for five days and it is going to be septic. The chlorine demand is going to be high. When it gets to that sewage treatment plant, (158) the sewage plant operator is going to know about it. He will have blinking lights all over the place. He won't be able to maintain the chlorine demand. The chlorine demand will go up, which means that the discharge from his plant is not going to be properly chlorinated and he is going to be in violation of the state law.

Q. Are you still assuming discharge in some small plant, but now,— A. You could put ten thousand gallons into Muskegon and do it.

Q. If the Water Resources Commission upgrades its plant to secondary treatment,— A. Uh-huh.

Q. —then you are going to have a better handling of the wastes because of that fact? A. No, not quite.

Q. And isn't it true that all of these communities are

going towards secondary treatment? A. No, not quite. You see, when you get into secondary treatment, the higher degree of treatment, the more care it requires. You go into biological activity, you must maintain very close controls. You maintain a high PH level in a holding tank so that you won't have it go septic, dump that into a municipal system. When it hits, **(159)** the biological activity is going to throw it out of operation totally. Then the community is going to pass a regulation that won't permit them to dump in passage, which means that when you go to shore, instead of being able to pump out in a hurry, you are going to have to hold—to have a holding tank and have a regulated discharge, which means it will take a number of hours before a ship can unload.

Q. Well, you again are assuming that every time a ship gets to a discharge point, it has got its tanks full that has developed a septic condition, and you know this isn't so. A. I know that sewage can become septic in a matter of 12 hours.

Q. Well, that may be so, but certainly this will be taken into consideration when these facilities are set up and the regulations are enacted, aren't they? A. I am at a loss—who would you regulate—they have already established the design for treatment facilities and there are no provisions for these kind of dumps in Michigan municipalities as far as I know anywhere.

Q. Well, this is a matter of future programming. Now, isn't it true that one of the disadvantages of the type of system that discharges at any **(160)** particular point of the line is that you can have the ship, or at least the discharge of sewage near water intakes, near a beach area—what guarantee do you have that there won't be these discharges? A. From the larger ships, what you are going to have is a navigation channel they are going to have to stay in so they won't be in the body contact area. If there are body contacts, it is going to be skiing and they wouldn't be out in the main channel. As far as the quality is concerned, the degree of treatment that would be coming from this unit would be no different than what you are

now requiring for the cities when they discharge in those areas that are listed as such as to be protected for body contact sports.

Q. But you still have no guarantee that they are going to follow any particular discharge program? A. No.

Q. Well, what about these small plants, aren't they subject to malfunction? A. Right.

Q. Haven't they had a lot of trouble in the past year with the small plant? A. This is true, from one design to another, but this is one of the reasons that in past years there were many **(161)** failures, but this is one of the reasons why they will require controls to determine whether or not the area device is maintained continuously during the period of time. Once you check that, then the states that have used that method as a requirement are able to go out and check to determine whether or not they are working.

Q. Well, if these small plants and individual plants work so well, why is it that here in the State of Michigan that industries are now required to have operators oversee these treatment facilities that individual industries have, if they work so well? A. When you take an industrial operation, you have got a different kettle of fish. It doesn't take too much of a loss somewhere through an industrial plant to upset the biological picture. We are faced with the same principle as this. If we put the chemicals in the holding tank on the ship and then dump that batch into a small community, it is going to be identically the same as an industrial operation, somewhere along the way, they wouldn't pay attention.

Q. Well, I'm not sure that, again, I have to take issue with you on this dumping, all of this will be in some small selected community, but we have gone over that and I am not going to go into that any further. **(162)** What work have you done on marine sanitation, Mr. Kinney? In designing facilities for ships, none. I am staying strictly to the principles of sanitary engineering, whether the waste comes from on shore or on ship, it's the same kind of bacteria from the body.

Q. If I follow your testimony correctly, the test of your testimony as far as sewage control is concerned is to take sewage and dump it somewhere in the middle of the lake. This is the best treatment you are advocating? A. No, not at all. I think your chances of having that occur with holding tanks are much better. Then if you are going to be held up in port in order to be able to maintain ships, they could take it outside the state line and pump it out. I am speaking of controls that will provide treatment on a continuing basis so that the waste water discharge is no longer sewage but actually treated waste water to meet the standards and the requirements that the State of Michigan would require for on shore facilities.

Q. So then you have no objection to holding tanks in using the on shore facilities if the on shore facilities are properly operated and proper precaution is taken? A. I'm sorry, I don't know what you mean.

(163) Q. Well, what I am indicating to you is, if under proper regulation so that the sewage does not develop secondary septic conditions and so on, that there is no reason to argue against discharging this at fixed points on shore that subsequently takes this sewage and have it treated properly? A. Well, I haven't seen the regulations, but I know of no regulation that would prevent sewage from turning septic.

Q. But, isn't there a way of checking this before discharging—you mean there is no way to determine whether the sewage discharged is— A. If it is septic when it comes ashore, then would you suggest then they couldn't put it in the sewer?

Q. No, I am asking you, supposing it is septic, then what are you going to do with it? A. Well, this is going to be one of the problems of maintaining it if you go to the holding tank. This is why I am suggesting you go the other route and you won't have this problem.

Q. But is this an insurmountable problem? As a sanitary engineer, don't you think it would be solved? A. We haven't seen the solution yet. All I am talking about is the sewage that develops in ships now will be

brought in, in terms of how you would solve—if you are going (164) to have a holding tank, we are going to have to have regulations to require a design of the inside holding tank so that we won't have any solids against the hull of the ship. We are going to have to have it so that you can have positive flushing and cleaning, so that we can have some type of regulated device that will prevent it from being septic, then have the limitation in terms of the bacteria and static material you can put out and the rate at which you can add it to the cities. I haven't seen this.

Q. I think you have answered my question. This is a matter of having a device so treating the sewage in the septic tank so that it doesn't develop a septic condition. Isn't there anything that can be added to sewage to prevent the formation of a septic condition? A. Without creating new problems, none that I know of.

Q. Well, what do you mean by without creating new problems? A. The kind of sewage—the kind of material you would add to sewage to prevent it from becoming septic are the kinds of chemicals that are going to interfere with your biological treatment, your secondary treatment plant you will require the community to put in.

Q. What is this—what kind of a substance would you be putting in there? (165) A. Well, you could use bacteria static, you could use high alkali. You could go to acid.

Q. And when you say it would be interfering with the community treatment facilities, just what do you mean? A. What it means is that you kill off your bacterial growth, which means—or that what you do is you put an overdemand on your chlorine demand; and either way, you are going to have a waste discharge from that secondary treatment plant that won't meet your state standards.

Q. Why, specifically, won't it meet state standards? A. Because the state standards set a requirement on the reduction of BOD's and it also sets a limit on coliform content. It's a bacterial indicator.

Q. So if you were to add any of the substances that you have mentioned, you say that this could not be handled properly by the sewage treatment plants—is that what you are saying—any of the substances you mentioned? A. I am suggesting that you could—if you provide a holding tank on the shore so that it dilutes out, but they won't be able to empty a ship in a hurry.

Q. I see. A. They are going to have to go to a regulated discharge.

Q. It is not an impossible situation. A. But it does do one other thing. It brings more of this **(166)** waste load in to shore which the State of Michigan is trying to clean up.

Q. But, nevertheless, it prevents random discharge from the ship, doesn't it? A. I don't know. I am being very honest about it. I don't know how you are going to provide a control to prevent the pump out of a storage tank in the water.

Q. Well,— A. With that kind of a slug out there, it is going to be worse than this ever was.

Q. But these matters of control are things which have to be worked out by the Water Resources Commission, don't you agree? A. Yes, but, to be very frank about it, as one who has operated a treatment plant, I have seen the difference between the theory of the regulation and the practice of the operation, but what I am driving at, it is a relatively simple matter to set up some controls but they are not so always easily policed.

Q. But they are a little easier to police on shore than they are at some ship running in the middle of the Great Lakes? A. I doubt it.

Q. Well,— **(167)** A. I think if you set the controls on these aerating devices, you will know whether they have been operating or not and you can fine them if they haven't.

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(175)

WILLIAM G. TURNEY, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION by Mr. Maslowski.

Q. Mr. Turney, where do you live? A. I live in Hazlet, Michigan, just outside of Lansing.

Q. What is your occupation, Mr. Turney? A. I am the Assistant Chief Engineer with the Michigan Water Resources Commission, Department of Natural Resources.

Q. What are your duties and responsibilities as Assistant Chief Engineer? A. Well, I am Assistant Division Chief, and have specific responsibility over a number of sections—a laboratory section, the field survey section, biological surveys, State biological staff, special projects including the watercraft pollution control program.

Q. Now, prior to, or, by the way, how long have you been with the Water Resources Commission? A. Six years.

Q. What were your other responsibilities with the Water Resources Commission prior to becoming Chief Assistant Engineer? A. Well, I was, prior to my present position, I was Regional (176) Engineer in charge of enforcement for the eastern half of Michigan.

Q. As enforcement engineer, what particularly did you do? A. Well, we were engaged in the water pollution control in general as it deals with municipal and industrial waste discharges and any other thing that might affect water quality.

Q. Prior to your employment with the Water Resources Commission, by whom were you employed? A. Michigan Department of Public Health.

Q. In what capacity were you employed there? A. Well, first as a special consultant to the hospital and medical facilities division and assisting them in their licensing program for hospitals and nursing homes; and then as a measurement engineer in the waste water section. Then we were giving consultations to municipalities in regard

to the proper operation of municipal sewage systems, approval of construction plans.

Q. Prior to your employment with the Health Department, who were you employed by? A. Well, I was in private consulting practice with John R. Snell Engineers for six years prior to that.

Q. And what did you do in that capacity? A. General design of municipal and industrial water waste (177) control facilities and solid waste disposal.

Q. Prior to that time what did you do, Mr. Turney? A. I was with the United States Navy, Civil Engineering Corps, for two years.

Q. What were your duties; and responsibilities there? A. I was assistant public works officer at the United States Naval Station in Bermuda.

Q. Do you have any degrees? A. Two degrees, bachelors, masters, in sanitary engineering, from Michigan State University.

Q. Do you have any, or did you take any special courses which relate to sanitation or public health in your work? A. Well, my entire curriculum was based on sanitary engineering and public health courses.

Q. Are you a member of any societies or organizations? A. Well, I am a registered engineer in Michigan, Wisconsin and a number of the Michigan water pollution control associations.

Q. Now, I believe you stated that you had a responsibility in connection with the state program relating to boating control; is that correct? A. That is correct.

Q. What is this responsibility that you have particularly? A. Well, the general supervisory control of the program, the (178) Water Resources Commission is the state agency which has been given the job of enforcing the water pollution control act and we are trying to discharge this obligation.

Q. When did you yourself get into this boating control program? A. It was in 1968. The present law was preceded by administrative rules which were developed by the Water Resources Commission for recreational

watercraft only and this was done in response to a directive request from the governor's office back in 1967; and I became involved in the program in 1968 and worked with it ever since.

Q. What do these rules provide? A. The administrative rules that were adopted by the Commission in June of 1968 provided for total containment of waste on board recreational watercraft with discharge into on shore waste collection and disposal facilities.

Q. Who promulgated these rules? A. The Water Resources Commission did.

Q. What was your enforcement program in connection with these rules? A. Well, there was minimal enforcement, in fact, no field enforcement of the administrative rules because the Legislature had not funded the program as such; and enforcement, as I said, was minimal and we concentrated during 1970, which **(179)** was the first year that the rules were effective, on educational methods to advise the boating public in advance that they should comply voluntarily.

Q. Well, now, since that time, of course, the Legislature has passed Act 167. Are you engaged in a program under that Act? A. Yes, we are.

Q. What does that program concern? A. Well, Act 167 extended the Commission's program of total containment to include the commercial fleet and it also clarified certain wording deficiencies that had been observed in the Commission's rules. But the program was pretty much a continuation of what we had been doing with the recreational fleet, trying to advise the commercial vessel owners and people engaged in the use of these vessels that they did now have a new obligation under the law and tried to work with them to see that they were able to comply with the law.

Q. Now, are these recreational boaters complying with the law? A. It is our estimate that at the end of last season, there was about 40% compliance with no field enforcement; and there certainly have been many other boaters, recreational boaters, who have installed retention systems on board over the winter.

(180) Q. Now, are there pump out facilities to handle these recreational boaters? A. Yes.

Q. How many pump out facilities are there in the state of Michigan? A. According to our latest survey, and this was a written response from the marina owners themselves, indicated over 135 pump out facilities on the Great Lakes shoreline.

Q. Well, now, over what period of time did these pump out facilities develop? A. Well, this has just been within the past few years.

Q. This was from 1968 to 1970? A. During 1969 and 1970, and so far this year.

Q. Now, what have you been doing to enforce the—to enforce Act 167 insofar as the commercial boats are concerned? A. Well, again there has been no field enforcement as such. We have been trying to contact the vessel owners through letters and telephone contact in some cases to encourage them to proceed voluntarily with some kind of a retention system that would comply with the law.

Q. Well, do you have any pump-out facilities for the commercial vessels? A. There are no fixed facilities that are available today, although there were plans under way to provide such (181) facilities, particularly in the Detroit area; and there have been arrangements made with one company who owns barges, floating barges, and he has indicated that he would be willing to transport these barges to any commercial vessel that would have need of pump out and the contents of their holdings tanks and retention systems could be discharged into the barges; and he does have a way to get this material then into the city of Detroit sewage system.

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(182) Q. Well, now, Mr. Turney, you say that there aren't any pump out facilities, but supposing the commercial boats had got busy and put in holding tanks. What would they have done with this sewage that would accumulate in the holding tanks? A. Well, I think there are two things to consider in regard to that question. First of all, the commercial carriers, many times moor and dock

at commercial locations, that is, at factory sites, and a number of the companies will be obligated to put in their own acceptance points which are connected with municipal sewage systems. In other words, it would be more opportune for them to put in their own pump out connections to the sewage system than to come around to a municipal facility.

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(184) Q. Well, let's take this situation: Here we have a ship with a holding tank and it has some sewage. It stops at one of these ports that has primary treatment. The sewage is injected into some line or manhole/ privy, whatever you want to call it. And then the plant operator proceeds to give this primary treatment. Is this the Commission's idea of pollution control? A. Well, that's a very good question, but it's a very critical question also because there is a big difference in discharging waste into a municipal sewage system even though it is inadequate at the present time, and having that waste receive only partial treatment with discharge into the water course of one of the Great Lakes. With that municipal system, we know where the semi-treated effluent is coming out. We protect other uses of the water, recognizing that that pipe is there. It is at a fixed location. We can control the installation of municipal water supply intakes to make sure that they are not located directly below that discharge.

Communities are aware of the discharge locations so you don't construct a swimming beach just below a (185) sewage outfall.

If that same sewage were discharged from ships or boats, you don't know where the discharge is occurring and unsuspecting people that use the water of the state have no protection whatsoever for such waste discharges.

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(186) Q. Well, Mr. Turney, do you have a practical solution where they can take the holding tanks, and I understand that when you put in sewage in the holding tanks, in a very short period of time it becomes septic and when this then can be delivered to the treatment plant

located in some small community and there is an immediate problem. A. No, there is no problem.

Q. What do you mean, there is no problem? You weren't here yesterday. A. There is no problem with accepting sewage, whether it is aerobic, anaerobic, septic or non-septic in a sewage treatment facility. It is practiced throughout the state for septic tank cleaners and haulers to discharge septic tank sludge into municipal sewage systems. This is where the health authorities want this material to go and it is a common practice in almost every city in Michigan to do this, and it causes no problem to sewage facilities. Anybody that says it does just doesn't know what the facts are.

(187) Q. Well, what about the sewage creating a dangerous condition, say, can it create an explosive condition under certain combinations? A. Well, any organic matter that is anaerobic septic could generate explosive gases, methane particularly, and I suppose that if you would hold a match at the right place at the right time that you could cause an explosion. But people constructing these holding tanks must recognize that this might happen, just as we recognize that there are certain hazards with fuel tanks on board vessels. So we design a system, naval architects design systems to make sure that this is taken care of, precautions are taken to make sure we don't have an explosive situation.

And it is a very simple thing in connection with holding tanks, sewage holding tanks, because all you have to do is vent these properly.

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(188) Q. What would you accept besides the holding tank that is currently on the market? A. Well, any system that would preclude overboard discharge. Now, it has been pointed out to us that if—that a strict reading of the law would prohibit the discharge of distilled water and I don't think that the Commission or the legislature or any staff member would be so ridiculous to say that distilled could not be discharged overboard. I don't know why you would want to discharge distilled water after you have gone that far in the treatment process.

But, the object is to preclude waste discharge and any system that could accomplish this would be approved. This could be distillation; it could be recirculation; it could be many other approaches.

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(189) Q. Well, I believe that there was some testimony yesterday that there either are or will be installed some devices aboard ships that provide something equivalent to secondary treatment. Now, what's wrong with a device of this kind as far as sewage disposal is concerned? A. Well, there's two things wrong with that idea. First of all, we know from experience that even the best municipal waste treatment facilities that are under constant supervision twenty-four hours a day have periods of malfunction, breakdowns; and these things always follow Murphy's law, they always happen at the worst possible time; and we are just totally convinced that the same thing would hold true with waste treatment facilities on board vessels. They have a tendency to break down and they do this at the most critical time, just when you are passing by a beach with swimmers on it or when you are passing over a water supply intake.

The Commission discussed this idea at great length when they were considering the administrative rules for recreational watercraft, and the experience **(190)** that we have had in Michigan and that people have had throughout the country just indicates that mechanical treatment systems where there is a discharge of treated effluent cannot be depended upon to give you the protection that you want and need.

Q. Well, there was some discussion concerning a biogest system. Is that a secondary treatment device? A. It would be the equivalent of a secondary treatment system, yes.

Q. Do your comments just made apply to this type of system likewise? A. Yes, they apply to tertiary and four-stage treatment for the same reason—they break down.

Q. Well, how much removal is there, for example, in the secondary system, of, say, suspended solids? A. Suspended solids, ninety per cent.

Q. Well, if you remove ninety per cent of the suspended solids with a device of this kind aboard ship, where is your problem? A. Well, it is not the suspended solids we are most concerned with. I think that we have always been most concerned with the public health significance of waste discharge. And this is measured in terms of the bacterial content in the discharge; and if you remove ninety per cent of **(191)** the pathogenic micro-organisms that might be in the waste to start with, that remaining ten per cent can cause you a great deal of trouble if you happen to be the person that gets the supply of water with those bugs in it. And even a ninety-nine per cent reduction is not considered satisfactory.

Q. Well, if—or, put in this way: So, here in Michigan, we have got a requirement of a holding tank or an incinerating device, but these ships passing through waters under the jurisdiction of other states and these plaintiffs say they are going to be subjected to a piecemeal patchwork system of contradictory state laws. What is your comment on that? A. Well, I would say that they could take themselves out of that position by putting in a total retention system. Holding tanks or retention systems are the ultimate in waste control for vessels and if they put this kind of system on, they are going to be in compliance with every rule and regulation that could ever possibly be devised by any state or national government.

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Q. Well, what, for example, let's take recreational boaters. What is the situation in the Great Lakes states other than Michigan as far as recreational boaters are concerned? **(192)** A. Well, a number of years ago, under the Joint State-Federal Enforcement Conferences for Pollution Control in the various Great Lakes, starting first of all with Lake Erie and the Detroit River, the conferees to these conferences were convinced that pollution from watercraft were problems—was a problem; and so one of the recommendations was that the states get together and come up with some uniform policy to control waste discharge. And out of it has come rules and regulations and

most of the Great Lakes states call for a total retention of waste on board and subsequent disposal ashore. At the present time the states of Wisconsin, Illinois, Indiana, New York, all have similar programs, and the Province of Ontario also.

Q. Do any authorities have similar regulations? A. Well, the Port of Chicago has a no-discharge ordinance that applies to both recreational watercraft and commercial fleet and their jurisdiction extends three miles out from the shore of Chicago. The St. Lawrence Seaway Authority is on record as not permitting discharges in the seaway.

Q. What states have the total retention concept as far as commercial boats are concerned as of today? A. Well, I know that Wisconsin does and outside of that, I **(193)** am not quite sure.

Q. Well, supposing an owner of a commercial vessel installs a holding tank and you have a state requirement in some other state that is something less than a holding tank. Does that put him into a difficult situation? A. No, I don't think so at all. Just because you have minimum requirements, doesn't mean that you can't do a better job, and I am sure that the other states that don't have as strict requirements would be pleased to have a shipper not discharge any waste, treated or untreated, in those state waters.

Q. All right, but there is no pump-out facility in this other state, what does he do with his sewage? A. Well, again, these ships have set runs. They are going back and forth between Toledo and Detroit and maybe the Upper Peninsula and they are coming into commercially owned wharves and pier locations; and much of this could be solved by the companies themselves installing acceptance points, whether it be in Gary, whether it be in Escabana, or whether it be in Detroit.

Q. What is usually involved in setting up an acceptance point? Is this some complicated structure that is just very expensive—what does this amount to? A. This is no big deal. It involves generally, in a **(194)** metropolitan

area like Detroit, the extension of a sewer lead out to a wharf or pier location. If the ship is running in cold weather, there may be some frost protection and so forth that would have to be made, but it is merely a hose connection where the men on board can make a coupling to the acceptance point with a flexible hose and pump the contents of the holding tank into the system.

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(198) Q. Well, essentially, what is the macerator-chlorinator involved, anyway—there has been some talk about that here, that particular device? A. Well, it is—basically it is a grinder that grinds up the sewage into small particles and this is followed by an attempt to disinfect, normally by the use of chlorine or chlorine compounds.

Q. What is the purpose of the chlorine? A. The chlorine is used to try to destroy the pathogenic microorganisms that might be contained in the sewage.

Q. Well, does it destroy them? A. Well, I think it depends upon whether or not the person has put chlorine in the device, the age of the device, whether or not when a person uses a head directly after another person has used it, because to do any effective job of disinfecting with chemicals, not only the amount of chlorine or disinfectant that might be put into the sewage but how much contact time there is with a chemical on the sewage; and if somebody, of course, flushes the unit right after someone else has, the contact time is cut short and the job will not be done.

Q. Well, as I recall some of the testimony yesterday, one of the witnesses for the plaintiffs was very enthusiastic (199) about package plants and didn't seem to think that you needed anybody to look after a package plant, that this was something that would take care of itself pretty well. What is your comment on that? A. My comment is the same as before, it just doesn't happen that way. No matter what the manufacturers tell you, any mechanical piece of equipment is going to require maintenance and supervision, and some more than others.

Q. Well, when I suggested to him that this difficulty had become apparent as far as industrial plants were concerned, he said, well, those are different—an industrial plant is somehow different from what would be aboard ship. What is your comment on that? A. Well, of course, they might be different in size. I don't think they would be much different in concept and I am sure that they wouldn't be different in principle as far as the mechanical systems are involved.

Q. But he seemed to indicate that there was one thing in treating sewage and another in treating industrial sewage, that there somehow was a difference. A. Well, certainly there is a difference between sewage and some industrial waste, but many of our industries also must treat their own sewage and they utilize package (200) plants to do this job.

Q. Well, are these package plants that treat sewage at industrial plants, are they being looked after by operators? A. Yes, especially since the start of this year, the state has a program for certifying industrial waste treatment plant operators.

Q. Now, the plaintiffs' witnesses seem to raise the point that if you had a holding tank, that the sewage in there would be highly corrosive and that you would run into problems because of corrosion in these tanks. What is your comment on that? A. Well, I can imagine situations where you might have some attack on mild steel tankage under certain conditions. This is a very small problem and in my way of thinking, if this is a problem for certain carriers, there are coatings that could be used on the inside of the tanks, or you could go to a plastic rubber lining, you could do any number of things to combat that one small problem.

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Q. I think that some of the testimony was directed towards ballast tanks and the possible use of ballast tanks for (201) sewage. Might not these same tanks be coated with something?

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The Witness: Yes, there will be no problem in coating tanks to prevent corrosion.

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(202)

CROSS EXAMINATION by Mr. Elder.

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Q. Now, the state of Michigan does permit package treatment units, does it not? A. In some situations, yes.

Q. Are you familiar with the town of Wixom? A. Wixom, yes, I am.

Q. That has a package treatment plant, does it not? (203) A. They may have—yes, I think they do.

Q. That is a town of about 1,000 people? A. Uh-huh.

Q. And you said before that the principle that particular package plant would be operating on in the town of Wixom is no different than would be on a vessel? A. Well, the same principles would be involved. I am not personally familiar with the treatment plant at Wixom.

Q. Now, isn't it true also, Mr. Turney, that this plant does not have a continuous operator but only periodic inspections? A. Again, I would not know for sure, but there are cases where the licensed operator might take care of more than one plant or not be on—

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Q. (By Mr. Elder, continuing) Doesn't this really involve only inspection once or twice a week? (204) A. No, it doesn't. It involves a good bit more than just inspection. There are variance degrees, there is sludge to clean out, top of tank scum. There are adjustments to be made in the sludge removal part of the system. There has been a great deal of work done at the National Sanitation Foundation within the past five or six years and if they have observed one thing, it is the fact that the package plants can't be stuck in the ground or stuck in a factory or stuck any place and just left alone to operate themselves. They just do not work that way. You have got to give, generally, daily inspection and routine maintenance several times a week.

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(207) Q. How do you—why is it so foolproof, then, to put into a municipal plant, as in a vessel, when you get breakdowns in municipal plants as well as you get in a vessel? A. Mr. Elder, as I mentioned before, we know where that waste discharge is coming out into the river or the lake from the municipal system and we don't know where your vessels are going to be discharging that untreated waste.

Q. Well, isn't it a fact that you know where the discharge is just as the result of the city or village happening to be at that particular location? A. No, it is not, no. Every city, every municipality and every industry that discharges into the waters of the state has to do this under order of permit, either the Water Resources Commission or the Michigan Department of Public Health, and there have been a number of situations throughout the state where a municipality (208) might more conveniently have discharged into the river at a certain point but they were required to go maybe several miles downstream in order to give maximum protection to a certain reach of the river that was used for other purposes, so it is not just that they happen to be there. There is a good deal of thought put into the design of the location of discharge.

Q. Then how do you justify putting secondarily treated sewage in the lakes from a city or municipality while at the same time prohibiting our vessels out in the lake? A. Well, when you say secondary treatment, all you are saying is that you have reduced the residual amount of pollutants going back into the water; and for (209) municipalities and industries, we know, at least we hope we know, how much residual waste can safely be assimilated by the receiving waters and design perimeters and criteria are established on the basis of the assimilation capacity of the receiving waters. There is still stuff going back into the water and because you remove ninety per cent through a secondary treatment facility on board your vessel, you still got ten per cent going in. So if you had ten times the number of ships, that would be the same as having the raw waste load from one ship going into the same spot.

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(210) Q. Now, you indicated that there are two barges in Detroit and some operator is willing to use them to pump out vessels? A. Yes.

Q. Do you know who that is? A. Yes, David Usher of Marine Pollution Control.

Q. Do you know the size of the barges? A. Six thousand five hundred gallons apiece.

Q. Are you sure of that? (211) A. This is what he has told me.

Q. Well, assume now, Mr. Turney, that a vessel came in with a holding tank of 40,000 gallons. How would you propose to pump it out into those two barges? A. Well, it would require several trips, I imagine.

Q. Now, I believe the fact is that there are 422 vessels of United States registry, and if those vessels all put in holding tanks and came down with 40,000-gallon holding tanks to pump out in two barges, it would be a pretty difficult job, would it not? A. I wasn't suggesting, Mr. Elder, that this is the only acceptance location that we hope to have for the commercial fleet. I am saying that this is the only one that we have available today.

Q. The only one that is present today? A. To my knowledge, yes, it is.

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(214) Judge Edwards: I have a number of questions. Just talking frankly about the problem, Mr. Turney, am I right in deducing that the state's basic attitude in relation to the package treatment proposal for ships is that the ships would not use it and that you couldn't make them do it because of the difficulties of policing?

The Witness: Well, I certainly didn't want to imply that they wouldn't make a—

Judge Edwards: Well, you are implying it when you say that you can use package treatment on land and you cannot on ship. I see absolutely no variation between the two except the fact that the ship is inaccessible to enforcement. Can you suggest a difference?

The Witness: Yes, there is a difference, your honor. The facilities on land, we have a good bit more control over because we have certification requirements (215) for the operators that operate these treatment facilities. These operators are required to make chemical determinations on the waste discharge, coming out of the plant, submit this information to us or to the Michigan Department of Public Health on a monthly basis. So we know pretty much that that system is receiving the proper amount of maintenance and supervision.

Judge Edwards: But your answer is that the difference is that you can police the facilities so that you know that the plants are properly maintained and kept in proper operation on land and you cannot on the ship, as far as you are able to ascertain?

The Witness: Yes, basically that is correct. I would think it would be very difficult for a chief engineer or anybody on board a vessel to take samples of the effluent discharge, for instance.

Judge Edwards: Why would that be difficult? All you have to do is to put a valve some place before the discharge into the lake.

The Witness: But I think that most—most engineers and most people on ship have enough duties without setting up a laboratory to test their discharge. This is what we do have at municipal and (216) industrial waste treatment facilities. They are generally small laboratories, small—even too large in some cases.

Judge Edwards: Operating, for instance, at Wixom?

The Witness: Again, I don't know about the Wixom situation, but the Ford Motor Company plant at Wixom has an operator who has laboratory facilities for that factory.

Judge Edwards: As a matter of curiosity, if a ship elected to violate the law and pumped out its retention tanks in the middle of Lake Huron, how could you stop them from doing that?

The Witness: We probably couldn't, although I think that any vessel owner that went to the expense of putting in a retention system would probably want to comply, and this, there may be—

Judge Edwards: Well, suppose he had a problem in terms of turn around and a pump-out delay on shore base would be substantial, why could he not, assuming the willingness to violate, that you are presupposing, why could he not just run all night through Lake Huron pumping out?

The Witness: We wouldn't have to run all night to do this. You could discharge in a very short (217) period of time.

Judge, I think that maybe, if this is what you are getting at, if a shipper did install a holding tank system and had no place to pump out, this would be the only alternative for him, and I would—if this problem were presented to me, I would suggest that probably the best way to handle it would be to pump out in the middle of Lake Huron temporarily until we had enough pump-out stations to service the vessels. This would be minimizing the effect on the lake, minimizing the threat to public health on a temporary basis.

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(227)

F. CLIFTON LIND, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION by Mr. Maslowski.

Q. Would you please state your name for the record? A. Yes, my name is F. Clifton Lind, L-i-n-d. Clifton is (228) spelled C-l-i-f-t-o-n, one "f."

Q. Where do you live, Mr. Lind? A. In Wyandotte, Michigan.

Q. And who are you employed by? A. I am employed by the County of Wayne as Port Director of the Detroit and Wayne County Port Commission.

Q. How long have you been Port Director? A. For three years.

Q. And prior to that time? A. Prior to that, I was Assistant Port Director for two years and Port Counsel for six years.

Q. As Port Director, what are your responsibilities, Mr. Lind? A. Well, we are the agency that has the general administration of matters in the ports. Under a state statute, just the general responsibilities of informational service and promotional service of the commerce, overseas commerce in the Port of Detroit and—well, we have some connections with other navigation.

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(229) Q. Well, were any plans made to install any pump-out facilities? A. Well, they are in various stages at the present time. Specifically what was done is we determined from the private operators that it would not be practical to have pump-out facilities at each of the overseas terminals. It would not only be costly but it would (230) constitute a duplication and it would interfere with the operation of the loading and unloading of the vessels. And we looked for a better solution. And it was decided that a more or less centrally located pump-out facility in the Detroit area and one—another downriver, would be much more feasible.

At present a site is being cleared—the ideal site which we found was at the foot of West Grand Boulevard at the location of the former Aquarama Steamship Company dock where the municipal sewer comes within two hundred feet of the dock itself; and an extension there would be not nearly so great an undertaking as it might be in some other location.

We are also exploring at the present time the availability of federal funds and possibly state funds under those circumstances for an extension of an existing municipal sewer.

And in the instance—in this particular instance, for overseas vessels which would not of course be the same thing as you are considering here, we felt that if there was

some other practical use that could be injected, it would be a much better situation and so our plans are for a lay berth at which such functions as clearance from agriculture, immigration, stores may be (231) taken on, fresh water and such things, that would save time at actual berth when the ship is brought to the loading and unloading berth, and under those circumstances, the pump-out would be just one detail and they would not be forced to come in there just for pump-out.

We have one under consideration. The engineers from the City of Ecorse were looking for a site that would be in reasonable proximity to the Nicholson Terminal and Dock. During the process we were informed that the lake carriers felt that the one—that the West Grand Boulevard location would be of very little use. So, in the process of trying to locate such a facility downriver, we are attempting to get one as close as possible to the mouth of the Rouge River so that the lake traffic in the short-cut canal and the Rouge River itself would—so that it would be more convenient for them and it would then be used both for their ships and for the overseas vessels.

This site has not been decided on. Two or three are being considered by the engineering department of the City of Ecorse at the present time.

Q. This facility that would be available to lake carriers, has this, or will be put in connection with whom, now? (232) A. This would be an extension of either the municipal sewer system of the city of Ecorse or of River Rouge. The City of River Rouge—they would most probably be in the City of River Rouge because the first site that seemed to fit the needs was emptying into the River Rouge, City of River Rouge system anyway under an arrangement that the two cities now have for their municipal sewage. So it ultimately, even if it is an intake point in the City of Ecorse, in that particular area at Great Lakes Avenue, the foot of Great Lakes Avenue, in that vicinity it just happens that all of their lines empty into the City of River Rouge sewer system anyhow; but, in any event, it would be a municipal system that would be extended.

Q. Now, have there been any conclusions as to what the charge might be on this type of usage? A. Well, the charge would be in a—I think I got some figures—at any rate, it would be in the same frame of reference as in the municipal system itself and whatever they charge to receive liquids into their systems from—from anyone else, such as the—they have these fellows that go around and pump out septic tanks and a tank truck and then they pump it and they run their trucks to some municipal facility and pump (233) it out, so that there is a charge of so much per gallon that is received. I thought I had those figures but I guess I don't. It was fairly nominal, though, I mean, it wasn't a large charge.

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(235)

CROSS EXAMINATION by Mr. Elder.

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(236) Q. I assume you realize, anyway, it is stipulated in the facts of this case, that on the average a vessel passes Detroit every twenty-nine minutes? A. Yes.

Q. With that frequency of vessel passages, do you think they could all stop at Detroit and pump out at these two facilities? A. They probably couldn't, but they wouldn't want to. I indicated that the overseas vessels are not as acute a problem as the lakers. The reason for this is that with holding tanks they could very easily make their whole circuit through the lake and out without discharging then if they so desired.

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(237) Q. Isn't it true that a lot of docks and plants around the Great Lakes do not have sewer connections? A. Well, there may be around the Great Lakes but not around Detroit and not in Wayne County.

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(238) Q. But even when you do get these pump-out stations at some uncertain unknown date in the future, you would still be going into these municipal plants that

provide only primary treatment; is that right? A. This is the situation at the present time, as I understand it.

Q. So those vessels which now have secondary treatment under Michigan law would be required to come into the pump-out station and pump into a primary treatment plant? A. I—this is a problem that fortunately—I have plenty of problems—this isn't one of them that I have to worry about.

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(240)

RICHARD D. DEWALT, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION by Mr. Maslowski.

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(241) Q. In what capacity do you work for Ford Motor Company? A. I supervise directly the maintenance and repair of the Ford vessels, which are six in number.

Q. What do these vessels do? A. They carry limestone, iron ore and coal from various ports of the Great Lakes to primarily the Rouge plant in Dearborn.

Q. Do you know what ports they get this limestone at? A. They carry limestone normally from Rogers City. They carry iron ore from Escanaba, Marquette, Duluth, Superior, various times, Port Arthur, Taconite, and Marquette. We also haul coal up from Toledo, Ohio, primarily. We do go to Sandusky, Ashtabula, and some of the other ports.

Q. How large vessels are these, Mr. DeWalt? A. They vary in—the largest is 647 foot long; the smallest is 504 foot long.

Q. How many men do these vessels carry? A. On the average, approximately thirty-two men.

Q. Now, Mr. DeWalt, it is my understanding that Ford Motor Company has installed some facilities to comply with (242) Act 167; is that correct? A. That is correct.

Q. Would you tell us what has been installed? A. Yes. We installed a total retention system for the sewage

on all the vessels. This consists of a recirculating toilet which replace the existing toilets. Then we connected these, or many of them were already connected into a previous sewage treatment plant. Then these discharge into a holding tank which we pump ashore when we get into the Rouge plant.

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Q. Now, what did it cost per vessel to install these? A. I can only give you an accurate estimate at this time because we don't have all the bills in for the materials, et cetera, but it would approximate one hundred and ten thousand dollars for the six vessels.

Q. So this is less than twenty thousand per vessel? A. That is correct.

Q. How long did it take to install these facilities in your vessels? (243) A. We—from the time we accumulated the material, it took us approximately four weeks to complete the job.

Q. This is on all the vessels? A. That is correct.

Q. Who did the installation work? A. We did much of the installation work ourselves—I am talking about the crews on the vessel. We had outside contractors do the other work, local outside contractors.

Q. Now, how large is this system that you have installed—what size is it? A. Well, if you are talking capacity, we tried to pump out no more than bi-monthly so we attempted to arrive at a good guess as to the size tanks we would need and the usage we would get, so we installed generally a one-thousand gallon tank forward and a one-thousand gallon tank aft.

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Q. Has your installation been approved by the Water Resources Commission? (244) A. Yes, it has been.

Q. Now, where will you be pumping out your tanks? A. Well, we contacted a number of local septic tank and sewage removal people and they came in and looked at the installation. We went out for bids and we have a gentleman who comes in with a—well, it is more or less a standard septic pump-out truck they use for septic tanks.

He comes in as we call him and he pumps the tank out and then he dumps it into a sewer within the Rouge plant.

Q. Now, do you know what his charge will be for that service? A. Yes, I can tell you approximately. We don't —we are still in the negotiating stage. It will be somewhere between fifty and seventy dollars per ship, per pump-out.

Q. This is for a two-week period, you indicate? A. That is correct, yes.

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(245)

CROSS EXAMINATION by Mr. Elder.

Q. Mr. DeWalt, you indicate that you have operated some six vessels? A. That is correct.

Q. Is one of those vessels The Henry Clay Ford? A. No, sir. One is the William Clay Ford. And Henry Ford II.

Q. Well, I meant the William Clay Ford. A. Yes.

Q. What type of facility did you have on that vessel before you went into this installation? A. We had American Ship System on that vessel.

Q. So you already had the piping in. The tanks were already there? A. That is correct.

Q. And so what you are using for holding tanks are the tanks that were there from this other system? A. That is correct.

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(247) Q. So, in effect, what has happened here is you have taken out a waste treatment system and put in this—changed it into this holding tank system and now are pumping it into a municipality that has only primary treatment; is that right? A. Yes.

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(248) Judge Edwards: I am clear that your system (249) does not use the holding tanks for either the water from bathing or from the galley?

The Witness: That is correct, yes, sir.

Judge Edwards: Those would be the primary additional water usages, would they not be?

The Witness: Yes.

Judge Edwards: The state of Michigan has indicated approval of your system as being within its interpretation of its state law requirements under Act 176?

The Witness: Yes, sir.

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(250)

JOSEPH V. COOK, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION by Mr. Maslowski.

Q. Where do you live, Captain Cook? A. I live in Okemos, Michigan, a suburb of Lansing.

Q. Who are you employed by? A. I am employed by the Bureau of Transportation of the Michigan Department of Commerce.

Q. In what capacity? A. As Director of the Port Division which consists of myself at this time.

Q. Prior to that time, who were you employed by, Captain? A. Immediately prior to my state employment, I was Port Director of the Port of Muskegon for nine years. Prior to that, I was a master of ocean vessels and port captain of a company on the east coast, prior to my employment in Muskegon.

(251) Q. Very well. Now, have you been connected with Act 167? A. After the passage of Act 167 the Water Resources Commission staff requested my assistance in attempting to implement the provisions relative to commercial vessels. This is an area that is part of my responsibility in state government.

Q. What did you do to implement that? A. I think our first approach was to attempt to evaluate the maritime components of the Great Lakes system, but it did appear at that time and still does appear that there are specific problems facing each of the separate components,

the overseas being one component and their operating pattern in Michigan harbors are restricted to some nine terminals in four different harbors. The domestic lake vessels can be looked at from being—is composed of two principal components—the proprietary, so-called proprietary owners who own their own vessels and in turn own the cargo and their own docks. They present one area for a specific type of solution. The itinerant or the carrier that has no set pattern or no point-to-point operation as characterized probably by the bulk of the lake carriers, has not been able to find a practical or even a temporary solution to that component.

And, of course, as far as the smaller craft as (252) towing boats, dredges, and non-descript vessels, they cannot be considered recreational watercraft and they, of course—there are a varying number of possible solutions to the full witholding on that class of vessel.

Q. Specifically, what is it you have been working with? A. My principal efforts have been in conjunction with the overseas component for one reason that appeared to offer some immediate solutions to the question of full retention, although at this time they are only temporary solutions.

Q. What are these solutions? A. Since several years ago when the city of Chicago enacted full retention in the Port of Chicago, a number of the overseas carriers used the monomatic system or portable retention system for subsequent disposal ashore; and over the years that system has developed that the vessels can acquire these units in a Canadian port, use them in any restricted area in the Great Lakes and then return them for disposal on their return.

Again, that system is practical only because the overseas vessels have a relatively fixed pattern of operation. They come in through the seaway and they go back out through the seaway and spend a limited period of time in Michigan ports and Michigan waters. So it (253) does appear to offer a temporary solution until such time as we are able to evaluate the pump-out needs of the fleet and

develop the necessary facilities to accommodate their particular requirements.

Q. Are you continuing to work on such evaluations? A. Again, the overseas carrier is in a slightly different position in that the overseas companies employ agents to represent their interests in the various ports and the agents have been requested to notify the vessels of the provisions of Act 167 and request information from them on what system they are using currently, what system they intend to use, and what shore facilities might be necessary for immediate or long-range use. This, again, is, in my opinion, necessary to make a full evaluation of the needs—

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A. (Continuing) In my opinion, to make a full evaluation of the needs of the fleet, at the same time we plan shore facilities for pump-out use.

Q. Have you made any surveys as far as pump-out facilities are concerned? A. By surveys—

(254) Q. Well, have you inquired of anyone as to pump-out facilities, any municipalities? A. Well, again looking at the overseas component, the principal ports for this type vessel activity has been the Detroit and Bay City-Saginaw and Muskegon and have at this point reviewed with the municipalities the provisions of Act 167 and have investigated possible sites that could be developed for disposal. In each case, some site was developed that appears to have some potential use for this purpose.

Q. You are talking about what location now? A. Bay City, Detroit and Muskegon.

Q. This has been developed with whom? A. With the city representatives of the Sewer Department and/or the representatives of the city government.

Q. Now, how would some of the smaller municipalities plan to handle this problem of discharge, say, a large quantity of septic waste from a holding tank? A. The problem of possibly introducing a large quantity of raw sewage into a municipal sewage system was recognized by the municipal sewage plant operators. However, they did

say that this should present no problem because it is quite possible to design a receiving tank at the pump-out location and then that tank would be subsequently (255) pumped into the sewage system as the system could handle it or as it was needed to empty the tank.

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(256)

CROSS EXAMINATION by Mr. Elder.

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(258) Q. Are you acquainted with Captain Aspin? A. I am.

Q. Can you tell us who he is, please? A. He is in charge of the Marine Operations Department of the Shipping Federation of Canada which federation is a—represents the majority of the overseas carriers that serve the Great Lakes.

Q. Didn't you write him a letter on the 20th of January of this year, 1971? A. I believe I did.

Q. And at that time didn't you tell him, and I quote: At this time pump-out facilities for vessels, sanitary wastes or oily bilge waters are not available in any Michigan port? A. That is correct.

Q. Didn't you then also write this, quote: The Water Resources Commission's opinion is that any commercial vessels moored or operating in Michigan waters, in order to be considered complying with the provisions of Act 167 should be equipped with some sort of permanent onboard retention system or incinerating (259) device which will effectively prevent overboard discharge of sewage wastes. Liquid galley wastes and wash water are not regulated under the provisions of the act. The Commission, however, recommends that commercial vessel operators and owners design holding tanks and other self-contained systems with a capacity which would enable the retention of these wastes as well since other jurisdictions on the Great Lakes may require their retention. A. Well, that was a direct quote from the letter from the Water Resources Commission.

Q. But it is the recommendation of the Water Resources Commission that these tanks include not only just human waste but all the galley waste and wash water and so forth? A. It was a recommendation at that time although the act does not specifically include galley waste or wash water under the full retention concept.

Q. Then you don't consider galley and wash water a noxious substance? A. It's not my determination of whether it is noxious or not. It is a question of what the law says and the interpretation of the Commission and who is responsible for making this determination.

(260) Q. I think you further indicated in your letter that you would accept on a temporary basis portable sanitation system as long as they did not discharge overboard? A. That is correct.

Q. And that is these heads or these portable red heads that you put on deck? A. Whatever system might be available that would serve this purpose.

Q. Now, isn't the average voyage, or, say, a combination tanker bulk cargo carrier of foreign registry, assuming she is coming here with steel, coming into Cleveland with steel from the seaway, then goes up to the head of the lakes for a load of grain and then back out through the seaway, would be about twenty-eight days before she got back there, wouldn't it? A. Could be that long.

Q. And assume she had a 35-man crew, isn't it true that the capacity of one of these Johnny on the spot or red heads or whatever you want to call them is 30 man days? A. I am not certain of what the life of this equipment is or whether the life is based on time or usage.

Q. Well, assume it is 30 man days, then, Captain, with a crew of 35, or 30 man days means one man for 30 days,— **(261)** A. Uh-huh.

Q. Assuming with a 35-man crew a 28-day voyage, this means to have total retention, you would have to put one john on the spot for each man on deck? A. That would be if I were concerned with total retention throughout that voyage. However, I am concerned with only Michigan waters since that is what the Michigan law per-

tains to. Now, that vessel in going from Cleveland to Duluth will not be in Michigan waters for 28 days.

Q. Well, now, if total retention is a valid principle, isn't it just as valid elsewhere as in Michigan? A. I would think it would be valid, but at this point Michigan is the only state that has such a statute.

Q. So that if they don't retain in waters outside of Michigan, discharge in Wisconsin, Ontario, and so forth, it is all going to come back into Michigan anyway, isn't it? A. It will not be guaranteed to come back to Michigan, it depends again on the currents, winds, and other factors. It could come back to Michigan or it could go elsewhere.

Q. I take it from your testimony, Captain, that you have not made any evaluation or your planning has not reached the stage of the ordinary commercial vessels on the Great Lakes? **(262)** A. That is correct.

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(268)

JOHN E. VOGT, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION by Mr. Maslowski.

Q. Where do you live, Mr. Vogt? A. In Lansing.

Q. And who are you employed by? A. The Michigan Department of Public Health.

Q. In what capacity? A. Chief of the division of engineering.

Q. Prior to that, or, how long have you been employed as chief of the engineering division? A. Since February of 1960.

Q. Prior to that time, what did you do, Mr. Vogt? A. I was a sanitary engineer with the Department of Public Health.

Q. How long was that duty? A. From 1940 to 1960.

Q. And prior to that time? A. I was with a county health department in Michigan, in Mt. Pleasant, Isabella County Health Department, as a sanitary engineer.

Q. How long was that employment? A. Since I got—since I graduated—from the time that I (269) graduated in 1937.

Q. Do you have any degrees, Mr. Vogt? A. Yes.

Q. What are they? A. A B.S.C.E. with Sanitary Engineering options from the University of Iowa and a Masters in public health from the University of Michigan.

Q. Now, getting back to your present employment, what does your present employment consist of? A. It involves the administrative direction of the environmental health programs of the State Health Department, which includes the supervision of public water supplies, supervision of municipal sewer systems and sewage treatment plants and three other sections, one on solid waste management, another one on food sanitation and another section involving a general environmental health program, including the licensing of septic tank cleaners, the licensing of trailer parks and agricultural labor camps.

Q. Have you then been connected with the Michigan Water Resources Commission? A. Yes, I represent the director of Public Health as—on the commission.

Q. Do you so represent him at the present time? (270) A. Yes, sir.

Q. Have you ever been an officer of the Michigan Water Resources Commission? A. Yes, I was chairman for two years.

Q. What years were those? A. Well, I am just the immediate past chairman. It was in 1969 and 1970.

Q. Well, in connection with your work with water supplies, for example, what specifically does your division do? A. We review the plans for all new water supplies and addition or changes to existing supplies, and the plans for these changes must be approved before construction begins. And then we also carry on a surveillance program which includes the actual field inspection of the supplies; also involves the training of water treatment plant operators; the review of monthly reports on the treatment.

Q. Have you given any consideration to discharges from commercial vessels as far as the water supply is concerned? A. Yes, we do.

Q. Have you reviewed such discharges in the light of Act 167? A. Well, we—in the light of 167, if that act was (271) complied with, then we feel that this would provide additional protection of the raw water to each water treatment plant so that this would—this would be an additional safety factor as far as the quality of the treated water is concerned.

Q. Well, how would this provide such safety factors? A. By virtue of the fact that without overboard discharge of sewage, there would not be the possibility of any of this waste, any of this sewage getting into the raw water intake of a water treatment plant.

Q. Well, from a public health standpoint, can these discharges affect anything else? A. Yes, from the standpoint of swimming, I feel that certainly they can be hazardous to people swimming.

Q. Well, you have heard the testimony here that some of these ships do have what is known as secondary treatment, that there has been argument here that ships should be allowed to have secondary treatment, that they should not be restricted to holding tanks. What is your comment on this? A. Well, I think that there is quite a difference here between, let's say, a land based secondary treatment plant and a secondary treatment plant, so-called, on a marine—on a vessel, even though they might both (272) put out the same degree of treatment, from the standpoint—one standpoint that was testified to earlier, that is, in the case of the municipal plants, the point of discharge is known and the fact that swimming does not take place within close proximity to the point of discharge; furthermore, a water supply is not taken close to a point of sewage plant effluent discharge; whereas, with the discharge of a secondary treatment waste from a watercraft or from a vessel, these are obviously mobile and they are in different locations and in the case of swimming, for example, let's say, in Lake St. Clair where there is considerable swimming taking place, the discharge from even a secondary treatment plant on board a vessel could still be discharging waste that could be hazardous to the swimmers, even if ninety per cent of the pollutants were re-

moved, including, say, bacteria, there still could be ten—sewage frequently has a bacterial count of one hundred million, you could still have ten million bacteria discharged into the lake. And this could include pathogens, that is, disease producing organisms.

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(273)

CROSS EXAMINATION by Mr. Elder.

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Q. Are you aware of the rules of the road that require small boats to keep out of the way of large ships which indeed can navigate only within the channel? A. I didn't say that they were swimming in the channel, but the fact is that currents and winds can certainly blow pollutional discharges all over in different portions of the lake so that if people are even in proximity they could be swimming in polluted waters.

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(275) Q. (By Mr. Elder, continuing): All right, now, Mr. Vogt, I want you to assume that we are going to put a holding tank on a vessel. You have indicated this would be a good system. And we will assume you have got a tank, like so. Now, how would you keep that tank, say you were going to store it for ten days—how would you keep it from getting septic? A. I wouldn't make an effort to keep it from going septic.

Q. Why not? A. Why so? There is no need for it.

Q. Wouldn't that contain methane gas? A. Yes.

Q. Wouldn't that be a hazard? A. Of course, that was covered this morning in other testimony and it was pointed out that proper design could properly vent that so that there would be no problem.

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(277) Q. All right. Now, let's take another tank. This is again a side view of a tank. We again put air into the tank. All right, we have our fluid coming in here. Now, in addition to this, Mr. Vogt, we put in a series of

baffles, keep this stuff percolating, then we have a flow-back device to pick up these solids and bring them back and recirculate them. Then we have an overflow here where the discharge comes off. And we have one of these typical package plant systems, haven't we, for waste treatment? A. Well, that is the general flow-through design for a so-called package type sewage treatment plant.

Q. Now, when this water comes off, how is it broken down, or what's its components? A. Well, that includes a lot of solids and it includes bacteria and it includes all of the chemicals, toxic or otherwise, that might be in the raw waste, or even the treated waste, as it goes through.

Q. But this comes off as secondary treatment now. A. No, I wouldn't say so. It is aerated sewage.

* * * * *

(280) Q. I ask you to assume that this is a secondary plant putting forth the standards that we had discussed and I just ask you a simple question: Isn't then the effluent, the coliform count, the same as the water quality standard you set for body contact sports? A. I can't answer that yes or no.

Q. No? A. Because the standards there indicate that the water in the stream must be—must not exceed one thousand coliforms per 100 cc. Now, the quality of water coming out of one of these sewage treatment plants, your package plant, is not the same kind of water because in addition to the thousand coliforms per 100 milliliters, there are also some other types of organisms that are in there that could be highly dangerous and they are not tested for,—

Q. What do you mean by that? A. —such as the virus of hepatitis, such as the typhoid **(281)** organisms. The coliform index is only an indication of the bacterial population in there. It doesn't—it doesn't tell you that this is all of the bacteria there or, in magnitude, total magnitude, or in the quality of the bacteria. There could well be other types of bacteria there that are not tested for in this coliform index.

* * * * *

(283) Judge Edwards: What is coliform?

The Witness: Sir, it is a type of bacteria.

Judge Edwards: Well, is it a specific type?

The Witness: It is specific, yes, sir. It is a specific type of bacteria that can be tested for. There are the types of bacteria that are commonly found in the warm blooded animals, in man and dogs and cats and otherwise, so that if this type of organism is found in, let's say, in a treated water (284) supply, then that indicates that there has been some source of contamination got into the water supply subsequent to treatment, but it is a specific type of bacteria that can be tested for routinely and inexpensively.

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(285) Judge Pratt: May I inquire, if I may, please.

Assuming you have a section of beach. You tested it and it shows a one thousand coliform count.

The Witness: Yes.

Judge Pratt: Then a ship goes by and discharges one thousand gallons of fluid which also has a one thousand coliform count. Does that merge, does it add, does it mean that if you take a sample of it right at that point, you would have a two thousand coliform count?

The Witness: Not necessarily, but you (286) could very well, your honor, have a different population of the remaining bacteria in that sample. In other words, the discharge from the vessel with one thousand coliforms could—the rest of the bacteria in that waste could be quite different from the rest of the bacteria on this beach with one thousand coliforms.

Judge Pratt: You have a difference in the—

The Witness: Because of the—because of these wastes coming directly from humans. You see, the thousand on the beach might be from humans, it might be from dogs, it might be from cats or run off from the soil, but the thousand coming from the—or in the waste coming from the vessel would be all from

human origin and we would know that there were other human bacteria in that—in those wastes, and the remaining human bacteria could well be some of the intestinal bacteria such as hepatitis, typhoid, dysentery—

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(290)

JOHN ASPIN, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION by Mr. Elder.

Q. What is your occupation, Captain Aspin? A. I am the Director of Marine Operations for the Shipping Federation of Canada.

* * * * *

(291) Q. What is the Shipping Federation of Canada? A. We are a representative association of owners, both domestic and foreign.

Q. What is your sea experience, Captain? A. I went to sea in 1952 and reached the position of command in merchant marine and I was seven years in—as a reserve, with both the British and Canadian navies in submarines.

Q. Now, Captain Aspin, what has been your experience with respect to placing these Johnny on the spots, and so forth, on these ships coming into the Great Lakes? A. My personal experience has been—has been very limited. But, in the meantime, I have attempted to advise owners that one of the remedial temporary measures until we get some clearcut, hopefully, federal legislation, that the Johnny on the spot is a measure that could in the past comply with the Chicago municipal regulations.

Q. Now, is that device used throughout Michigan waters? A. The Michigan legislation was sprung upon us rather at the last minute, but in an effort to comply until we know (292) exactly where we are going, I confess we are rather bewildered at the moment, the owners are attempting to adopt, if they don't have any equipment on board, Johnny on the spots as a temporary measure.

Q. Were you using these only in ports, or would you be able to use these all the way through, through all Michigan waters? A. Well, the demand upon Johnny on the spots, and the difficulty in habilitating them on board, necessitates that you not only use them for a limited period, but in order to attempt to abide by the legislation, they would only be used in Michigan waters.

Q. What is the status of pollution legislation on the St. Lawrence Seaway? A. They both, the St. Lawrence Seaway Authorities and then its United States counterpart, the St. Lawrence Seaway Development Corporation, regulate in their—contained in their regulation is a passage to the effect that vessels transiting the St. Lawrence Seaway should be prepared to comply with the regulations that exist in the waters into which they intend to frequent or transit.

* * * * *

Q. Now, what is the situation in Canada itself as far as (293) the Great Lakes are concerned? A. As far as the Great Lakes in the whole of Canada, if I may say, we have, after recirculating draft regulations, arrived at what the industry feels is this rather stringent set of regulations specifying the quality of effluent which a vessel is permitted to discharge providing it has on board the equipment laid down in these draft regulations. It is more the quality of the effluent which the Canadian government is concerned with and we are, although stringent, we are prepared to act and abide by these regulations; but I think, in all sincerity, the owner, the ship owner wishes to feel that before he adapts and goes through the expense of adapting his vessel to meet these regulations, that the equipment which he adopts is going to suffice for all the waters in which his vessel, his particular vessel or fleet of vessels is going to trade.

* * * * *

(294) Mr. Maslowski: Your honor, may I ask a few questions concerning this proposed exhibit?

Judge Edwards: Yes, you may.

VOIR DIRE EXAMINATION ON PROFFERED EXHIBIT.

By Mr. Maslowski:

Q. Captain, who were these regulations developed by? A. The Canadian government, the Ministry of Transport.

Q. Have there been any hearings on these regulations? A. Yes, there have, but not in the same sense as you have federal hearings, but they have and they have been circulated during the strict comment.

Q. But the industry has not commented on these, I take it? A. Yes, they have most certainly. They have been circulated since 1962; and that is the fourth and supposedly final draft.

Q. You mean they have been in circulation for eight years? A. Yes.

Q. They haven't been adopted yet, have they? A. No, they have—

Q. I say, have they been adopted? (295) A. No, they have not.

Q. When will they be adopted? A. Our bill C-2, which is our act to amend the Canadian Shipping Act, received force of law on the 30th of March of this year.

Q. What does that mean? A. These can now be given force of law themselves as regulations. And I must sort of backtrack slightly. The garbage section of those regulations received force of law and are now in being; and they received force of law on the 14th of—I think on the 14th of April, give or take a day; and we are waiting, as I have—and I have correspondence to this effect—the sewage regulations would have gone into force. However, the Canadian government accepted the industry's joint proposal, and I might say this includes the American Institute of Merchant Shipping, the Lake Carriers Association, to strive for uniformity in federal regulations between Canada and the U. S., and they have held off putting those or giving the sewage section of those regulations force of law until after a meeting arranged between Mr. Jensen and Mr. Volpe to be held in Washington in June of this year.

* * * * *

(296) Q. Captain, I hand you a document marked Plaintiffs' Exhibit 23. Would you examine that and tell us what it is, please? A. Yes, this is a communique of intent, a joint communique of intent between Canada and the United States, and the outcome of ministerial meetings on Great Lakes pollution. And the particular intent to which I just referred was that Messrs.—Mr. John Jensen, Minister of Transport, and Mr. Volpe,—

* * * * *

(297) The Witness: I beg your pardon. The statement of intent, joint intent being a communique from Mr. Jensen, the Minister of Transport in Canada, and Mr John Volpe, the Secretary of Transportation; and it is the result of a ministerial meeting on Great Lakes pollution dated the 23rd of June, 1970. And the specific clause to which I previously referred is that they both—they state that in both countries legislation exists for the regulation of waste disposal by commercial vessels and pleasure craft and the ministers concerned have agreed to achieve compatible regulations.

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VOIR DIRE EXAMINATION ON PROFFERED EXHIBIT.

By Mr. Maslowski:

Q. Captain, I direct your attention to Part I, Sewage (298) Disposal, particularly No. 7. I will read that to you and see whether or not I am reading it accurately: Notwithstanding Sections 5 and 6—Sections 5 and 6 being certain sections that provide for coliform numbers and so on—it says: The Minister of Transport may designate waters into which the discharge of sewage is prohibited. Is that right? A. That is correct.

Q. So that would mean that if the Minister of Transport felt he could tell these boat owners, you can't discharge any sewage in these waters period; right? A. This is what I read from it.

* * * * *

(301) Judge Pratt: My understanding was that even if it were treated, they could still specify areas where no discharge can be made.

May I see that exhibit, please?

Mr. Maslowski: Yes, it is specified right in here, your honor.

The Witness: That Section 5 is—implies that—

Judge Pratt: Do you understand that to mean regardless of whether it is treated or not, that the Minister of Transport may designate waters into which (302) no discharge can be made at all?

The Witness: Yes. He could have the power, regulatory power to designate areas where no discharge would be possible.

Judge Pratt: That is true in Chicago, apparently; is that right—no discharge can be made at all in the Chicago area?

The Witness: Yes, this is true. I am not an expert, I am afraid, on the Chicago regulations. They are flexible.

* * * * *

(303) Judge Pratt: What I am trying to get at, Captain, is this, that if each jurisdiction retains the right and is given the authority to designate areas in which no discharges can be made, then what difference does it make whether you have uniformity of types of chemicals or machines or anything else to prepare sewage for discharge that has only a certain count, the uniformity is lost then, isn't it, if each jurisdiction can set aside given areas, it doesn't matter what kind of a device you have aboard ship. If you can't discharge on the Canadian side of the Detroit River, for example, then it doesn't do you any good and there is no uniformity, is there, unless you have a holding tank and then you pump out?

The Witness: (Gesturing) Yes, well,—yes, unless you did have a holding tank and—but it—if I may say so, this is a—it is like bringing about a (304) fait accompli. There is no provision for the

owner to adapt to the provisions of the legislation, there is no need then.

Judge Pratt: I am in agreement with you, Captain, but the point is that, apparently in these regulations, and this is true of the federal statute, as a matter of fact, upon application to the proper department, a state may, with their permission, designate certain areas where no discharge can be made period. What I am suggesting to you is that if that is the uniformity, then you lose the uniformity—

The Witness: Yes.

Judge Pratt: —because if each jurisdiction retains that, then each ship is going to have some kind of holding tank. Now, it depends on the number and extent of the area as to how big the holding tank has to be.

The Witness: This is correct, what the ministry implies is in Section 5, what is really intended is. I know that.

* * * * *

The Deposition of RALPH PURDY, taken on behalf of Plaintiffs, before Katherine Joann Hyde, Notary Public, at Seven Story Building, Lansing, Michigan, on Thursday, April 8, 1971, at the hour of 10:30 o'clock A.M.

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(3)

EXAMINATION by Scott H. Elder, Esq.

Q. Would you state your name? A. Ralph W. Purdy.

Q. And where do you reside? A. Lansing, Michigan.

Q. What is your occupation? A. Executive Secretary of the Michigan Water Resources Commission and deputy director of the Department of Natural Resources.

Q. And how long have you held that position? A. I have held two positions for approximately two years.

Q. That is deputy director and executive secretary? A. Director since March of '69.

Q. And prior to holding these positions, Mr. Purdy, what was your occupation? A. I have worked for the

Michigan Water Resources Commission for 21 years in various occupations, stream inspector, sanitary engineer, regional engineer, chief engineer, and now executive secretary.

Q. And what is your educational background, Mr. Purdy? A. I am a chemical engineer registered as a Professional (4) Engineer in the State of Michigan.

Q. From what school did you graduate? A. Michigan State.

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Q. Do you have specific jurisdiction of municipal waste ~~treat~~ing systems? A. The Water Resources Commission, as I understand the statute, has overall responsibility with respect to municipalities. It shares certain functions with the Michigan Department of (5) Public Health. The director of the Department of Public Health has responsibilities, specific responsibilities, and the approval of construction for and supervision and operation of treatment plants that serve the public.

Q. If I understand you correctly, then, you do exercise direct control over municipal waste treatment systems? A. The Water Resources Commission has overall responsibility for the fall of effluents in the surface waters of the state.

Q. Did you set the standards of those effluents? A. The Commission sets the standards and advises the Michigan Department of Public Health on the effluent quality that the municipality should meet.

* * * * *

(7) Q. Now, you speak of quality. How do you define—how do you spell it out? In what terms, "B.O.D." or what? A. The quality is normally spelled out in concentration and pounds of biochemical oxygen per day. It may spell out a concentration of—of ammonia, unoxidized ammonia. It spells out normally suspended solids concentration. It spells out a level of coliform and in certain other special circumstances may spell out phenolic concentration, or any (8) other substance that may be anticipated in the effluent and, in addition to that, there is a normal

requirement that the facility be able to remove a minimum of 90 per cent of total phosphorous discharge to the treatment facility.

Q. Well, now, what is primary treatment? A. Primary treatment alone removes the solid that will settle in a tank, designed to provide a detention time of so many minutes or so many hours.

* * * * *

Q. What is secondary treatment? A. The conventional definition of secondary treatment means a step—a second step beyond primary treatment. Now, in some instances, people consider chlorination to be a secondary step; however, this is not the generally accepted definition of secondary treatment. Secondary treatment, in the past, has normally—the installation of facilities (9) that would provide, through biological means, additional removal of suspended solids and other oxygen consuming substances that are subject to biological oxidation. In addition to that, secondary treatment of that type will provide some removal of the coliform.

Q. Can you tell me what secondary treatment is in terms of "B.O.D." and so forth? A. Again, through engineering design, this secondary treatment plant can be designed to provide for a broad range of removal. On the average, though, I would expect that you could say that you would anticipate 90 per cent removal of the five-day biochemical oxygen demand, equal removal of suspended solids. I would not guess on the total coliform removal since again, this is not really effective removal of total coliform.

Q. Well, does secondary treatment cover a range, then, anywhere from say the figures you gave me on primary treatment up to the figures you just gave me on secondary? A. Not normally. The range of, say, biochemical oxygen removal would be, say, from 70 per cent up to 95 plus per cent.

Q. You would consider that secondary treatment? A. Yes.

* * * * *

(10) Q. What type of treatment is the municipality of Detroit now providing? A. Detroit, at the present time, is providing primary treatment, with the addition of ferrous chloride to eliminate the soluble phosphorus from being a nutrient source and it is providing chlorination of the primary treatment plant effluent.

Q. Do you enter any orders against municipalities requiring them to provide a better treatment of secondary treatment? A. Yes.

(11) Q. And what is the situation with respect to Detroit? A. Detroit now is under a stipulation. This is an agreement signed voluntarily between the City of Detroit and the Water Resources Commission to provide for a higher degree of treatment. This particular stipulation sets forth specific restrictions with respect to biochemical oxygen demands, suspended solids, phenols, coliform, total coliform; specifies a degree of phosphorous total—pardon me, soluble phosphorous removal. It may include other specific restrictions.

* * * * *

(12) Q. When do you expect Detroit will have full secondary treatment? A. I expect Detroit to—under its present schedule, to be meeting the terms of the Commission's requirements by late '73 or early '74. I am not quite sure about that date.

* * * * *

(17) Q. All right. Thank you. I have here a map of Michigan. I should have brought a navigation map, but I didn't. Now, Mr. Purdy, we have already discussed Detroit. What type of municipal treatment do they have in (18) Port Huron, Michigan? A. Port Huron, at the present time, has primary treatment. Pardon me, with chlorination.

Q. Is Port Huron under any specific order? A. Port Huron is one of the communities in Michigan that has signed a voluntary stipulation with the Water Resources Commission and it calls for improved treatment including phosphorous removal and control of discharges from combined sewers.

Q. When will that be completed? A. Again, I have to search my memory on this. This is a fairly recent one. I believe it calls for construction to be initiated late this year and for the facilities to be completed and placed in operation in 1973.

Q. '73. All right. How about Bay City? What is the treatment in Bay City? A. Right at the moment I can't tell you because they are very close to having completed secondary treatment facilities with chlorination and phosporous removal.

Q. Bay City, then, doesn't have secondary treatment yet? A. It may have, and it may not. It may have primary treatment of chlorination. It may have secondary treatment, phosphorous removal and chlorination, because those facilities were placed under construction last year.

(19) Q. How about Alpena? A. Alpena has primary treatment and chlorination.

Q. Any order outstanding on Alpena? A. I don't believe so at the present time, except—no, I don't believe so.

* * * * *

Q. All right. Well, how about Mackinaw Island? A. Mackinaw Island is under an agreement with the Commission to provide waste treatment at those facilities, and those facilities were bid in December and it is my understanding that they are asking for rebids and construction to be official in the spring of this year.

* * * * *

Q. How about Sault Saint Marie? A. Sault Saint Marie, at the present time, has primary treatment and chlorination.

Q. Any order outstanding on Sault Saint Marie? A. Not at the present time, although the Commission has held conferences with Sault Saint Marie and has notified Sault (20) Saint Marie of their intent to require phosphorous removal in addition to primary treatment and chlorination, and plans have been prepared for that. They have been presented to the Water Resources Commission and have been approved on behalf of the Water Resources

Commission. They were—since this is on interstate waters, it requires approval of the federal agency in addition to the Water Resources Commission. They were sent into the federal agency, I believe, in December of 1969. The federal agency has not acted on that yet.

* * * * *

Q. All right. Now, how about Manistique? A. Manistique has primary treatment and chlorination at the present time.

* * * * *

Q. Escanaba? A. Escanaba has secondary treatment and chlorination at the (21) present time, and it is under an agreement with the Water Resources Commission to provide for phosphorous removal in addition to the secondary treatment of chlorination.

* * * * *

Q. How about Marquette? A. Marquette has primary treatment and chlorination at the present time.

Q. Any order outstanding on Marquette? A. Marquette, I believe, has a stipulation with the Water Resources Commission to provide a—provide for secondary treatment unless it can be demonstrated that a lesser degree will meet the water quality standards at that point, and in addition, it must provide for the removal of total phosphorus.

Q. All right. What about Muskegon? A. Muskegon, at the present time, has primary treatment and chlorination.

(22) Q. Any order outstanding on Muskegon? A. Muskegon has entered into a voluntary stipulation with the Water Resources Commission calling for a higher degree of treatment, phosphorous removal and chlorination, and the Muskegon County has proposed a treatment system, and the initial plan has been approved, that provides for the collection of all waste from the Muskegon area, that is Muskegon Heights, the City of Muskegon, and North Muskegon, will transport this back inland. It will be treated and then the effluent from the treatment system

will be sprayed upon approximately 6,000 acres of land and there will be no discharge to the lake.

Q. Well, then, Mr. Purdy, if I understand your testimony, with the possible exception of Escanaba, for the various ports we have gone through here, none, at the present time, have secondary treatment? A. Of the various ports that you went through?

Q. Are there any other ports that you know of that presently, today, have secondary treatments? A. St. Joseph-Benton Harbor, I believe, is a port. St. Joseph-Benton Harbor provides secondary treatment and chlorination.

Q. Then there are only two, Escanaba and St. Joseph-Benton Harbor? A. I am not familiar with what you consider to be ports.

(23) Q. I have named most of the ports that our vessels trade to. A. Of those you have named, those are the two.

* * * * *

Q. Has your agency published any rules or regulations defining or specifying what is an approved dock side or onshore collection treatment facility? A. No, sir.

* * * * *

(24) Q. Well, now, have you published any rules or regulations dealing with such matters as fittings or connections or anything of that nature so there will be uniformity among these vessels? A. The Commission has adopted certain interpretative rules with respect to the statute, but it does spell out the size of the fittings to be used.

* * * * *

(25) Q. (Mr. Elder) Section 8. Now, that section provides, about three-quarters of the way down, that commercial docks and wharfs designed for serving and loading cargo and/or freight from commercial water craft must furnish facilities if deemed necessary as prescribed by the Commission to accommodate discharge of sewage from heads and galleys and for deposit of litter, garbage, trash

or bilge waters from the water craft which utilize the docks or wharfs.

Now, Mr. Purdy, has your agency made any determination as to what commercial docks are necessary to have these facilities? A. No, sir.

Q. You have published no rules or regulations of that nature? A. No, sir.

Q. Have you prescribed any such facilities for commercial vessels? A. No, sir.

Q. Do you intend to publish any rules or regulations of that nature? A. If it is necessary I expect the Commission will. At this point in time, they have contacted the various—or various commercial docks, or owners of these docks, and have asked for voluntary installation of facilities to service boats that would dock.

* * * * *

(27) Q. Now, I direct your attention to Section 3 of the Act. Have—has your agency promulgated any rule or regulation spelling out or defining what is a noxious discharge? A. No, sir.

Q. Have you published any rule or regulation spelling out what discharges otherwise make the waters unwholesome or are detrimental to the public health or welfare or to the enjoyment of waters for recreational purposes? A. No, sir.

* * * * *

(33)

EXAMINATION by Jerome Maslowski.

* * * * *

(34) Q. Did you have any conferences with any commercial shippers and carriers? A. My staff members have held a number of conferences with the owners.

Q. Would you have any idea as to which of the Plaintiffs that your staff contacted? A. Well, we have—and I don't know who has, which one belongs to say which owner of the Plaintiffs, but we have contacted and have had occasion to at least partial compliance with the Commission requirements from the Grand Truck Western Rail-

road; from the Wisconsin and Michigan Steamship Company, the Chesapeake and Ohio Railroad, the Boblo boats, American Oil Company tankers, Kinsman Marine Transit Company, the Arnold Transit Company, Welch Soo Locks Tour Boats, the Beaver Island Ferry, United States Steel, Hanna Mining Company, Canada National Railway, Atlantic-Richfield Oil Company, Gulf Oil Company, U. S. National Parks Service, The U. S. Corps of Engineers, the Orvin Sand Transportation (35) Company, Johnston Shipping Limited, the Ann Arbor Railroad Company, and the Ford Motor Company.

Q. Now, when you contacted carriers, what type of a procedure did you indicate to them as to, say, enforcement and compliance? A. Well, many of the shippers participated in at least one of the conferences and my staff members informed me and the others that the shippers expressed their concern that they would not be able to meet the January 1, 1971 date, or would not be able to be in compliance when their vessels started the 1971 commercial shipping season, and that there was not sufficient time to make the conversion, and in our discussion with the owners, or their representatives, we have indicated to them that we felt that this problem should be handled in the same fashion as any other existing problem, at a fixed shore installation. What I mean by this is that where an existing problem is identified by the Water Resources Commission, the Commission first attempts to develop a voluntary program of compliance that includes a reasonable time schedule for the facilities to be placed in operation. If this cannot be accomplished, why then the Commission carries through on formal enforcement action under other provisions of the statute, but now, specifically with respect to the commercial fleet, we felt, and have worked (36) towards obtaining a schedule which would set forth a time for the vessels to be in compliance with the Commission requirements.

* * * * *

(38) Q. Well, supposing they have something equivalent to secondary treatment, and the regulation is pro-

vided that they discharge this effluent in the middle of the lake? What is wrong with that? A. If this is—could be policed and so forth, and an assurance that this is the only point the discharge would take place, I don't see anything particularly wrong with it, however, the statute does not provide for that.

* * * * *

(42) Q. Well, supposing Mr. Elder's clients had been diligent and installed holding tanks aboard some of their ships. Where would they be pumping the stuff out into? A. This would depend largely upon the docks that they call on. In many instances, the vessels dock at their—at company owned facilities, and we have been in contact with these companies, and it is the company that owns the vessel to begin with, that they should provide this pump out facility at their own dock.

* * * * *

(43) Q. Let's assume a vessel has a holding tank, and it is just traveling through Michigan waters. It is outside of Michigan waters. The tank is getting pretty full. There's no pump out facilities anywhere. What do they do with the sewage they have got in the holding tank? A. Under the interpretative rules, it provides that the commercial vessels, because of the size of the holding tanks that will be installed on the vessels, can include facilities to pump that tank out. Now, it would be unfortunate, from the standpoint of pollution control, if it was necessary for that ship to pump out the contents of that tank in waters of the Great Lakes other than Michigan waters, but it could do so.

Q. How do you justify something like that? This is not pollution control, is it? (44) A. No, it is not pollution control, but from the standpoint of Michigan itself, jurisdiction ends within Michigan waters. The State of Indiana has adopted compatible legislation with that of Michigan including requirements for commercial vessels. The Port of Chicago requires that there be no discharge from vessels within the Port of Chicago, so that a number

of jurisdictions around the lakes are exercising their responsibilities.

Q. Well, now, under your rules, what are they required to put into this holding tank? A. At the present time we are looking at primarily sanitary waste from the toilet facilities. We do believe that when the conversion is being made, that in particular, on the commercial vessels, that the galley waste should be looked at depending upon the type of galley waste that they might have.

For example, if they have garbage grinders, certainly they shouldn't grind that as a part of the discharge waste and discharge this into the waters of the Great Lakes.

Q. Now, I think the complaint has been made that these tanks are difficult to put in; that some ships don't have the space to put them in. What is your comment on something like this? A. First, a number of vessels have indicated to us that they **(45)** will install these facilities, and I do not believe that these vessels are of unique construction with respect to other vessels that are on the Great Lakes, although again, I am not intimately familiar with the commercial fleet, but no matter what type of treatment facility is placed on the vessel, it requires some tankage; ~~it~~ requires some alteration of plumbing and I do not believe that the holding tank requirement would be of any great significant difference over that of the installation of the secondary treatment facility.

* * * * *

(46) Q. What about this direct discharge by Mackinaw Island? Where **(47)** is this discharge being made? A. This is being made into the deep waters of Lake Huron off Mackinaw Island by a submerged pipe line.

Q. How far is the point of discharge from the island? A. That was installed several years ago. It is several hundred feet offshore, and I believe in 65 to 80 feet water depth, but this is not considered by the Commission to be a satisfactory arrangement and action has been taken to require treatment.

Q. Why is it that your Commission doesn't treat ships on an individual basis like you do municipalities? A. The —first of all, there are the requirements of the statute, and then secondly, the fact that the ships represent a mobile point of discharge rather than a fixed point of discharge. I believe, again, a third point would be the matter of operation of these facilities. I would expect that if there were a flow through device that then again this would come under, say, the requirements of 245 of 1929 as amended, which requires that there be a certified operator of that facility, and that a monthly report of the quality of the effluent would have to be filed.

* * * * *

(50) Q. Well, Mr. Purdy, assuming that this litigation was disposed of, eliminated, call it what you will, say that the Complaint was dismissed. What would the procedure of your Commission be relative to the shippers in proceeding against them as far as, say, installation of facilities was concerned? Would you say, "Well, now, you have to have these in next week"? How would you anticipate to proceed? A. Well, certainly Mr. Maslowski, this is a decision of the Water Resources Commission, the seven-man Commission, and (51) not its staff, but the staff, in its action, certainly would be guided by the past attitude of the Commission in dealing with any other pollution problem in the State of Michigan, and the Water Resources Commission has always instructed its staff to first seek voluntary compliance without additional formal action by the Commission; and this voluntary compliance can include a time schedule that the staff believes to be reasonable for compliance.

Now, if the staff is not able to reach agreement with the waste discharger, then this matter is brought before the Commission for their review and in my several years of experience with the Water Resources Commission, they have listened to the problem of municipalities and industries in meeting the Commission requirements and have been sympathetic to them in their time requirements to meet the Commission requirements, and even when they

have failed to meet the Commission requirements timely, the Commission has listened, and in many cases extended the time for compliance when the waste discharger has been able to show that he has worked diligently to meet the time schedule, but that unforeseen difficulties have caused a delay, and the Commission has not, in its past activities, sought the collection of a fine or enforcement through the court as a first order of priority in obtaining compliance.

* * * * *

(53)

EXAMINATION by Scott H. Elder, Esq.

Q. I just have a few clarifying questions, Mr. Purdy. Isn't it true that pollution is pretty much a problem of concentration? A. Yes.

Q. So that if you could disperse all of this pollution and so forth it wouldn't be nearly as bad, would it? A. This would depend upon the particular type of pollutant. (54) There are some that are persistent. There are some that are accumulative, and there are some like—like nutrients that even when dispersed, create problems in the Great Lakes.

Q. Let's confine ourselves to the human body waste which is what we are concerned with here immediately. A. I am concerned with nutrients in human body waste, because we do have phosphorus contained in the waste from the human body, and that this is considered to be one of the key nutrients that has accelerated the rate of aging of the Great Lakes.

Q. Well, now, by requiring vessels to pump into shore side facilities, you are really adding to the concentration in those particular areas, aren't you? A. Not necessarily, because, for example, the City of Detroit's stipulation spells out a specific number of pounds that it can discharge into the Detroit River, and this is a fixed number no matter what the raw load is into the treatment plant.

Q. Now, you indicated earlier that in your opinion, secondary waste treatment aboard a vessel was all right provided it was not discharged into an area where there

was total body contact? A. Total body contact. You would have to add into that municipal water supplies.

(55) Q. Water resources. All right. By total body contact you mean swimming, that type of thing? A. Swimming, water skiing.

* * * * *

Q. You say Michigan jurisdiction extends out only to the international boundary line? A. Yes.

Q. And you know, generally, that the international boundary line passes through the Detroit River? A. I know that it passes through the Detroit River.

Q. So you would have no jurisdiction on the Canadian side of the river? A. That is correct.

Q. So that a vessel down-bound on the Michigan side could not pump out, or could not have overboard discharge, whereas a vessel proceeding up-bound on the Canadian side would be completely unrestricted. Isn't that true? A. I am not fully acquainted with the Canadian requirements with respect to discharge from commercial vessels.

Q. Let me put it this way: They would be out of your jurisdiction? (56) A. That is correct.

* * * * *

Q. But under your Michigan law, even though those boats do have secondary treatment, however many there are, they would have to discharge ashore, wouldn't they, into a plant which has primary treatment only in most instances? A. Yes.

* * * * *

(3)

REAR ADMIRAL WILLIAM F. REA, III.

EXAMINATION BY COUNSEL FOR PLAINTIFFS.

By Mr. Elder:

Q. Would you state your full name? A. William F. Rea, III.

* * * * *

Q. And what is your rank in the United States Coast Guard? (4) A. Rear Admiral, United States Coast Guard.

* * * * *

Q. Since becoming an Admiral, what positions have you held in the Coast Guard? A. I was Commander, 9th Coast Guard District—the entire Great Lakes area for 2 years and since 1 July of 1970 I have been back here as the Chief Officer of Merchant Marine Safety.

Q. What generally is the 9th Coast Guard District? A. The 9th Coast Guard District encompasses the land area surrounding the Great Lakes area. Part of eight states bordering on the Great Lakes.

* * * * *

Q. Now, as the chief officer in charge of Merchant Marine Safety in Washington, what is your function? A. To head up the entire Merchant Marine program throughout the United States and overseas where we have it.

* * * * *

Q. Would you explain to us what a Certificate of Inspection is. A. A Certificate of Inspection is a document that includes considerable amount of data that the vessel has been inspected and meets the applicable standards and applicable regulations and the Certificate of Inspection includes data as far as the minimum manning requirements and all data on firefighting and lifesaving data and other pertinent details related to equipment.

* * * * *

Q. What parts of the vessel does that inspection involve? A. The hull, the machinery—all parts.

Q. The entire vessel? A. Yes.

Q. What about the structure of the vessel? A. The inspection encompasses inspection for structural adequacy.

* * * * *

Q. Now, bearing in mind the class of vessel we have been discussing, what would be your inspection requirements where an owner wants to install holding tanks or incinerating devices? A. Any equipment such as you

mentioned has to obtain our approval. The first stipulation would be the owner would have to submit plans of his proposal to our office in Cleveland where we have a technical group and he can proceed when they are approved. The requirements in this particular case of the equipment only relates to what effects they may have on the safety of the vessel. In case of an incinerator it may pose a fire hazard and from a safety standpoint it is not a hazard.

* * * * *

PLAINTIFF'S EXHIBIT 22.

Proposed Sewage and Garbage Pollution Prevention Regulations.

Regulations Respecting the Prevention of the Pollution of Waters by Sewage or Garbage from Vessels

Short Title

1. These Regulations may be cited as the *Sewage and Garbage Pollution Prevention Regulations*

Interpretation

2. In these Regulations,
   (a) "Board" means the Board of Steamship Inspection created persuant to Part VII of the *Canada Shipping Act;*
   (b) "B.O.D." (Biochemical Oxygen Demand) means the oxygen, measured in milligrams per litre, required by bacteria while stabilizing the organic matter in a sample of sewage under aerobic conditions over a period of five days at 20 degrees Centigrade;
   (c) "Canadian waters" means the territorial sea of Canada and all internal waters of Canada;
   (d) "coliforms" means all of the aerobic and facultative anaerobic gram-negative, non-spore forming, rod shaped bacteria that
      (i) in the Tube-Dilution (most probable number) test, ferment lactose with gas formation within 48 hours of incubation at 35 degrees Centigrade, or
      (ii) in the Standard Membrane Filter Technique, produce a dark colony (generally purplish green) with a metallic sheen on M-Endo Broth or Agar within 24 hours of incubation at 35 degrees Centigrade;

(e) "garbage" means solid galley waste, paper, rags, plastics, glass, metal, bottles, crockery, junk or similar refuse;

(f) "inland waters of Canada" means all the rivers, lakes and other navigable fresh waters within Canada, and includes the River St. Lawrence as far seaward as a straight line drawn

(i) from Cap des Rosiers to West Point Anticosti Island,

(ii) from Anticosti Island to the north shore of the River St. Lawrence along the meridian longitude sixty-three degrees west;

(g) "Inspector" means

(i) A Steamship Inspector appointed under the *Canada Shipping Act* or

(ii) a person designated as an Inspector pursuant to section 11;

(h) "pleasure craft" means a vessel being used for pleasure and not carrying persons or goods for hire or reward, and includes a vessel chartered or hired by or on behalf of the persons carried therein;

(i) "sewage" means human waste and includes wastes from water closets, urinals or hospital facilities handling fecal material;

(j) "vessel" includes any ship or boat or any other description of vessel used or designed to be used in navigation.

Application

3. (1) These Regulations apply to vessels other than pleasure craft.

(2) Part I applies on the inland waters of Canada

(a) to a vessel the keel of which is laid, construction of the hull of which is commenced, or major conversion of which is contracted

for on or after (date of Order in Council); and

(b) after (date of Order in Council plus three years), to a vessel the keel of which was laid or construction of the hull of which was commenced before (date of Order in Council).

(3) Parts II and III apply to vessels while they are in Canadian waters.

Exemption

4. Notwithstanding anything contained in these Regulations, the Board may exempt any vessel from full compliance with any of the requirements of these Regulations.

PART I

Sewage Disposal

5. In the case of a vessel carrying more than 10 persons, no person shall discharge from the vessel into the water any sewage

(a) containing more than 1000 coliforms per 100 millilitres;

(b) containing more than 150 milligrams of suspended solids per litre; or

(c) with a B.O.D. of more than 50 milligrams per litre.

6. In the case of a vessel carrying not more than 10 persons, no person shall discharge from the vessel into the water

(a) any sewage containing more than 1000 coliforms per 100 millilitres, and

(b) while the vessel is in waters that may be designated by the Minister of Transport, any sewage

(i) containing more than 150 milligrams of suspended solids per litre; or

(ii) with a B.O.D. of more than 50 milligrams per litre.

7. Notwithstanding sections 5 and 6, the Minister of Transport may designate waters into which the discharge of sewage is prohibited.

8. Dilution of sewage as a means of attaining the standards for sewage described in sections 5 and 6 is prohibited.

9. Arrangement shall be provided so that samples of the sewage discharge may be obtained from inside the vessel.

PART II

Garbage Disposal

10. No person shall discharge garbage from a vessel into Canadian waters.

PART III

Enforcement

11. The Minister may designate a member of the Public Service of Canada or the Royal Canadian Mounted Police, a provincial municipal or harbour police officer or a water pollution control officer as an Inspector for the purposes of these Regulations.

12. An Inspector may go on board any vessel within Canadian waters and may

(a) inspect the vessel or any part thereof;

(b) examine the owner, master or any member of the crew respecting any violation or suspected violation of these Regulations;

(c) take such samples as considered necessary from the vessel; and

(d) investigate the circumstances relating to an alleged pollution of Canadian waters by sewage or garbage.

13. (1) No person shall obstruct or hinder an Inspector in the performance of his duties or functions under these Regulations.

(2) No person shall make a false or misleading statement either verbally or in writing to an Inspector engaged in the performance of his duties or functions under these Regulations.

(3) Every person shall give all reasonable assistance requested by an Inspector to enable the Inspector to perform his duties and functions under these Regulations.

Penalties

14. Where sewage or garbage is discharged from a vessel contrary to these Regulations, the owner and the master of the vessel as well as the person directly responsible for the discharge thereof is guilty of an offence and is liable on summary conviction to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding six months or to both such fine and imprisonment.

15. Every person who contravenes or fails to comply with any of these Regulations is guilty of an offense and is liable on summary conviction to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding six months or to both such fine and imprisonment.

PLAINTIFF'S EXHIBIT 23.

Communiqué No. 42, for Immediate Release
June 23, 1970.

COMMUNIQUÉ OF THE CANADA/UNITED STATES MINISTERIAL MEETING ON GREAT LAKES POLLUTION.

Department of External Affairs
Ministère Des Affaires Extérieures

Ministers and representatives of the governments of Canada and the United States met today in Ottawa to discuss common problems of pollution in the Great Lakes. The Canadian delegation included the Minister of Energy and Resources Management from the Province of Ontario. At the meeting they discussed each country's current plans, programs and legislation to improve water quality in the Great Lakes.

Ministers and representatives discussed the recommendations in a Special Report submitted in April by the International Joint Commission on potential oil pollution, eutrophication and pollution from watercraft. It was agreed:

a) The Canadian contingency plan for the Great Lakes for spills of oil and hazardous materials which will shortly come into operation, will be fully coordinated with the new United States plan.

b) Inputs of phosphates into the Great Lakes should be reduced in order to arrest and reverse eutrophication of the Great Lakes. Canadian legislation will permit the Canadian Government to implement the Commission's recommendations for reducing and eliminating phosphates from detergents and the Canadian Government has announced its intentions to take action that would meet the IJC recommendations. Standards are in effect on the United States side of the Lakes which will require the

achievement of an 80% removal of all phosphates from municipal and industrial sewage (including detergents) by 1973, and in advance of the target date of 1975 recommended by the Commission; the United States Government is continuing its intensive review of the removal of phosphates from detergents.

c) In both countries legislation exists for the regulation of waste disposal by commercial vessels and pleasure craft; and the Ministers concerned have agreed to achieve compatible regulations.

It was noted that the Ontario Government intends to modify its gas drilling program on Lake Erie to conform to the recommendations of the Commission in the Special Report. There is no gas well drilling by Michigan, Ohio, New York or Pennsylvania in Lake Erie. It was further noted that phosphate removal facilities are being initiated by Ontario with a view to meeting the recommendations of the Commissioners.

Ministers and representatives expressed deep concern about the critical situation in the Great Lakes, and noted the determination of the Governments to take decisive action.

The Ministers have agreed to the establishment of a working group to consider common water quality objectives and implementing programs which may be proposed by either government to the working group. This working group will report back to this Ministerial Conference which will be reconvened subsequent to the final report of the IJC.

The United States delegation was led by the Honourable Russell E. Train, Chairman of the Council on Environmental Quality; United States Ambassador Adolph Schmidt; Mr. Carl L. Klein, Assistant Secretary of Interior for Water Quality Research and Rear Admiral Robert W. Goehring, Chief of Operations, U. S. Coast Guard, who were accompanied by senior officials from the Department of State, the Department of the Interior, the Department of Transportation and the Council on Environmental Quality.

The Canadian delegation was led by the Honourable Mitchell Sharp, Secretary of State for External Affairs; the Honourable J. J. Greene, Minister of Energy, Mines and Resources; the Honourable J. Davis, Minister of Fisheries and Forestry; the Honourable Herb Gray, Minister without Portfolio and the Honourable George Kerr, Minister of Energy and Resources Management for Ontario.

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E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-4221

LAKE CARRIERS' ASSOCIATION and
AMERICAN STEAMSHIP COMPANY, *et al.*,
Appellants,

vs.

RALPH A. MacMULLAN,
Individually and as Director,
Michigan Department of Natural Resources, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION.

JURISDICTIONAL STATEMENT.

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Michigan Watercraft Pollution Control Act of 1970 (Act 167 of 1970; C.L. '48 § 323.331; M.S.A. § 353 (201) et seq.) 3, 4, 56

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In the Supreme Court of the United States

OCTOBER TERM, 1971.

No. _____.

LAKE CARRIERS' ASSOCIATION and
AMERICAN STEAMSHIP COMPANY, *et al.*,

Appellants,

vs.

RALPH A. MacMULLAN,
Individually and as Director,
Michigan Department of Natural Resources, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION.

JURISDICTIONAL STATEMENT.

Appellants'* appeal from the final judgment of the specially constituted United States District Court for the Eastern District of Michigan, Southern Division entered on July 12, 1971 dismissing appellants' action for declaratory judgment and injunctive relief. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

---

* Appellants are:
American Steamship Company, Inc.
Amersand Steamship Corporation
The Reiss Steamship Company
Gartland Steamship Company

(Continued on following page)

OPINION BELOW.

The opinion of the United States District Court for the Eastern District of Michigan, Southern Division is not reported. A copy of the Court's memorandum opinion dismissing the action is attached hereto as Appendix A. A copy of the temporary restraining order issued by the Court on March 16, 1971 is attached hereto as Appendix B. A copy of the Court's order extending the temporary injunction until the hearing of appellants' application for interlocutory injunction is attached as Appendix C. Appellants' motion for injunction pending appeal, denied by the United States District Court for the Eastern District

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(Continued from preceding page)

Great Lakes Steamship Division
Bethlehem Steel Corporation
Cleveland-Cliffs Steamship Co.
Cleveland Tankers, Inc.
Erie Sand Steamship Company
The Hanna Mining Co.
Huron Portland Cement Division
National Gypsum Company
Inland Steel Company
The Interlake Steamship Co.
Division of Pickands Mather & Co.
Kinsman Marine Transit Company
Medusa Portland Cement Company
Columbia Transportation Division
Oglebay Norton Company
Lake Fleet Division
Republic Steel Corporation

Appellees are:

Ralph A. MacMullan, individually and as Director, Michigan Department of Natural Resources
Ralph W. Purdy, individually and as Executive Secretary, Water Resources Commission
Frank J. Kelly, individually and as Attorney General for the State of Michigan
Michigan Department of Natural Resources and The Michigan Water Resources Commission

of Michigan, Southern Division, on September 15, 1971, is attached hereto as Appendix D. Appellants' brief in support of said motion is attached hereto as Appendix E because it establishes why appellants should prevail on appeal.

JURISDICTION.

This action was instituted by appellants on March 16, 1971, pursuant to 28 U.S.C. §§ 1331, 1333, 1337, 2201, 2281 and 2284, to annul, enjoin and set aside the Michigan Watercraft Pollution Control Act of 1970 (Act 167, Public Acts of 1970, State of Michigan; C. L. '48 § 323.331; M.S.A. § 353 (201) *et seq.*). In accordance with 28 U.S.C. §§ 2281 and 2284, a District Court of three judges was duly convened and, after a full evidentiary hearing, oral argument and the submission of briefs, the Court rendered, on July 12, 1971, its memorandum opinion dissolving the temporary restraining order, entered on March 16, 1971, and dismissing the complaint without prejudice to appellants instituting other appropriate judicial proceedings.

The jurisdiction of the United States Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. § 1253. *Florida Lime and Avocado Growers, Inc., et al. vs. Jacobsen,* 362 U.S. 73 (1960). Notice of appeal was filed in the United States District Court for the Eastern District of Michigan, Southern Division on July 29, 1971, attached hereto as Appendix F.

STATUTES, LAWS AND TREATIES INVOLVED

Michigan Watercraft Pollution Control Act of 1970 (Act 167 of 1970; C.L. '48 § 323.331; M.S.A. § 353 (201) *et seq.*); attached hereto as Appendix G. The Federal Water Pollution Control Act as amended by the Water Quality Improvement Act of 1970, 33 U.S.C. § 1151, et seq.; the Steamboat Inspection Acts of February 28, 1871 and May 27, 1936, 46 U.S.C. § 361, et seq.; the Boundary Waters Treaty of 1909 between the United States and Canada, 36 Stat. 2448, Treaty Series No. 548; and Article 1 § 8, cl. 3; Article 3 § 2, cl. 1; Article 6, cl. 2, Amendment XIV § 1 of the Constitution of the United States.

The Michigan Watercraft Pollution Control Act of 1970 as particularly pertinent here, provides:

> Sec. 1 (g) "Watercraft" means any contrivance used or capable of being used for navigation upon water, whether or not capable of self-propulsion, including foreign and domestic vessels engaged in commerce upon the waters of this state, passenger or other cargo-carrying vessels and privately owned recreational watercraft.
>
> Sec. 3 (1) A person shall not place, throw, deposit, discharge or cause to be discharged into or onto the waters of this state, any litter, sewage, oil or other liquid or solid materials which render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes.
>
> Sec. 4. (2) A person owning, operating or otherwise concerned in the operation, navigation or management of a watercraft having a marine toilet shall not own, use or permit the use of such toilet on the waters of this state unless the toilet is equipped with 1 of the following pollution control devices:
>
> (a) A holding tank or self-contained marine toilet which will retain all sewage produced on the

watercraft for subsequent disposal at approved dockside or onshore collection and treatment facilities.

(b) An incinerating device which will reduce to ash all sewage produced on the watercraft. The ash shall be disposed of onshore in a manner which will preclude pollution.

Sec. 11. Any person who violates any provision of this act is guilty of a misdemeanor and shall be fined not more than $500.00. To be enforceable, the provision or the rule shall be of such flexibility that a watercraft owner, in carrying out the provision or rule, is able to maintain maritime safety requirements and comply with the federal marine and navigation laws and regulations.

QUESTIONS PRESENTED.

On the pleadings and the evidence, issue was joined in the Trial Court with respect to the following questions:

1. Does the Michigan Watercraft Pollution Control Act of 1970 conflict with the Federal Water Pollution Control Act, as amended by the Water Quality Improvement Act of 1970, so as to impair Federal superintendence of the field?
2. Did the Congress, in enacting the Water Quality Improvement Act of 1970, express a clear and manifest intent and purpose to occupy the field?
3. Do the vessel inspection laws administered by the United States Coast Guard preclude state prescribed standards with respect to shipboard pollution control devices?
4. Does the Michigan Watercraft Pollution Control Act of 1970 materially affect interstate and foreign commerce in matters where uniformity is neces-

sary and relate to a subject demanding exclusive Federal regulation?

5. Does the Michigan Watercraft Pollution Control Act of 1970 contravene the essential purposes of and work material injury to characteristic features of the maritime law and interfere with its proper harmony and uniformity?

6. Does the Michigan Watercraft Pollution Control Act of 1970 constitute the taking of appellants' property without due process of law in violation of Section 1 of the 14th Amendment to the Constitution of the United States?

7. Does the Michigan Watercraft Pollution Control Act of 1970 deny to appellants the equal protection of the laws in violation of Section 1 of the 14th Amendment to the Constitution of the United States in that such act makes it unlawful for commercial vessels to discharge overboard any sewage, whether treated or not, while at the same time no Michigan law prohibits shore based industry and municipalities from discharging inadequately treated sewage into the waters of the Great Lakes?

8. Does the Michigan Watercraft Pollution Control Act of 1970 violate constitutional requirements of due process and equal protection of the laws in that the act is so vague and ambiguous that it does not specify with sufficient certainty the conduct which it intends to prescribe and punish?

9. Is the State of Michigan required to make application under Section 13(f) of the Water Quality Improvement Act of 1970 to the Secretary of the Interior to determine whether any applicable

water quality standards require a complete prohibition of all overboard discharges of sewage in any of the waters of the State of Michigan before prohibiting such discharges?

The Trial Court dissolved the temporary restraining order and dismissed the complaint without prejudice to appellants instituting other appropriate judicial proceedings. Thus the issues presented to this Court are:

1. Did the Trial Court abuse its discretion in abstaining from deciding the issues raised by the pleadings and the evidence?
2. Did the Trial Court abuse its discretion in failing to permanently enjoin enforcement of the Michigan Watercraft Pollution Control Act of 1970 because said act is constitutionally infirm?
3. Did the Trial Court err in finding that no judiciable controversy exists?
4. Did the Trial Court err in holding that supremacy clause cases are not within the purview of a three judge court when there are also other substantial constitutional issues involved?

STATEMENT OF THE CASE.

Appellants brought this action to determine the constitutional validity of the Michigan Watercraft Pollution Control Act of 1970 as applied to federally licensed vessels engaged in interstate and foreign commerce upon the waters of the Great Lakes. At the outset, appellants wish to make it abundantly clear to the Court that they have not challenged Michigan's law out of any desire to avoid responsibility for preserving the ecology. Such is the duty of every citizen. Rather appellants' interests go beyond

the waters of Michigan and extend to all of the Great Lakes states. Only through uniform standards applicable throughout the entire Great Lakes, including the waters of Canada, can the water quality of the lakes be preserved.

The 19 individual appellants in this case own and/or operate a total of 187 Great Lakes bulk cargo vessels. All of the vessels owned and/or operated by appellants are federally enrolled and licensed for employment in the coasting and foreign trade on the waters of the northern, northeastern and northwestern frontiers, otherwise than by sea, pursuant to the Act of February 27, 1877 (46 U.S.C. § 258). All of appellants' vessels are subject to the provisions and regulations of the federal vessel inspection laws administered by the United States Coast Guard, the same being Title 52 of the Revised Statutes (46 U.S.C. § 361, et seq.).

In all, as of January 1, 1970, there were a total of 442 vessels in excess of 1,000 tons on the Great Lakes. Of this total, 263 were vessels of United States registry, having a combined tonnage of 1,802,776 gross tons, and 179 were vessels of Canadian registry having a combined tonnage of 1,576,165 gross tons.

Appellants are engaged in the business of providing vessel transportation in interstate and foreign commerce, some for their own account and some for the account of others, or both, throughout the entire Great Lakes-St. Lawrence Seaway System, serving in interstate commerce and/or foreign commerce a variety of ports in the states of Minnesota, Wisconsin, Illinois, Indiana, Michigan, Ohio, Pennsylvania, and New York, and the Provinces of Ontario and Quebec, Canada. The principal trade patterns of the Great Lakes are as shown by the series of flow charts, prepared by the Great Lakes Regional Statistical Office of the Corps of Engineers for the year 1964 (the

last year for which such charts are available) attached as Appendix H.

The flow charts, typical of present day trade patterns, show that for the year 1964, of 62,972,820 short tons of commodities in domestic commerce alone passing down Lake Huron, 43,888,559 short tons moved beyond Michigan and into Lake Erie. Of 36,373,213 short tons of commodities passing down Lake Michigan in domestic commerce, 30,954,329 short tons moved beyond Michigan and were discharged in Illinois and Indiana. The flow charts further show that if car ferry, cement, sand and gravel tonnages are included in addition to the basic bulk commodities such as iron ore, coal, grain, stone and petroleum, the total commerce of the lakes, in 1964, was 210,830,576 short tons, of which only 47,000,277 short tons were received in and 24,219,669 short tons were shipped from the lower peninsula of Michigan. Thus, by far, the vast majority of Great Lakes commerce, i.e., more than 67%, or a total of 139,610,630 short tons out of a total commerce of 210,830,576 short tons, does not utilize or touch Michigan ports.

Great Lakes vessels have the capability of operating within the Great Lakes system as far east as Anacostia Island. Depending upon their trades, some vessels, while traversing Michigan waters, never touch at Michigan ports. Other vessels, while trading into Michigan ports part of the time, may at other times engage in different trades such as between Toledo, Ohio and Buffalo, New York or Chicago, Illinois and Oak Creek, Wisconsin, where they not only do not touch at Michigan ports, but they do not even traverse Michigan waters.

Crew size ranges from thirty to thirty-five men per vessel. Each man generates approximately 125 gallons of liquid wastes per day. This includes wash water, drainage

from normal showers and vehicle water to handle sanitary facilities. Act 167 of the Public Acts of Michigan, 1970, provides that a vessel having a marine toilet may not use, or permit the use of, such toilet on the waters of the State unless the toilet is equipped with one of the following pollution control devices:

(a) A holding tank or self-contained marine toilet which will retain all sewage produced on the watercraft for subsequent disposal at approved dockside or onshore collection and treatment facilities.

(b) An incinerating device which will reduce to ash all sewage produced on the watercraft. The ash shall be disposed of onshore in a manner which will preclude pollution.

Act 167 of the Public Acts of Michigan, 1970, also provides that a person shall not discharge into or onto the waters of the State any other liquid or solid materials which render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health and welfare or to the enjoyment of the water for recreational purposes.

Were the vessel owners to install holding tanks, it would be necessary to have pump-out facilities at basically every port on the Great Lakes in order to carry on normal trade. Not only are there no pump-out facilities for commercial vessels in states other than Michigan, there are no such pump-out facilities even in Michigan. Because there are no pump-out facilities in Michigan or elsewhere at the present time, the only alternative for a vessel with holding tanks is to pump those tanks out in the middle of the lake.

No practical incinerating device which will totally dispose of all liquid wastes created aboard a commercial vessel has been developed. Such incinerating devices as do exist are purely in the experimental stage and not yet proven.

With the exception of Escanaba and St. Joseph-Benton Harbor, none of the port cities in Michigan provide secondary treatment of municipal sewage wastes. Many communities, such as Mackinac Island, do not even provide primary treatment. While many such cities ultimately plan to provide secondary treatment, the construction of the necessary treatment facilities is subject to a time-table prescribed by the Michigan Water Resources Commission. Detroit, for example, the largest port in Michigan, will not have full secondary treatment until late 1973 or early 1974, some 2 to 2½ years hence. Thus, were commercial vessels at the present time to install holding tanks and pump into municipal facilities, no better than primary treatment could be achieved. Primary treatment alone, depending upon the detention time designed into the system plant, removes in the neighborhood of 25% to 30% of the biochemical oxygen demand, 50% of the suspended solids and alone has very little effect upon the total coliform count.

Treatment devices suitable for shipboard installation on commercial vessels are available which produce the equivalent of secondary waste treatment. Such facilities are already in use on some 27 Great Lakes vessels. Further, the use of such devices, commonly called "package plants," is prevalent on land for small communities, shopping districts, resort areas and isolated industries.

The Michigan Water Resources Commission readily admits that there is nothing wrong or harmful in a commercial vessel discharging in the open lake an effluent which has received the equivalent of secondary waste treatment. At the same time, the Commission reiterates that it would be unfortunate from the standpoint of pollution control if a commercial vessel were to pump out holding tanks containing raw sewage in waters of the Great Lakes other than Michigan waters, but that it could do so,

because from the standpoint of Michigan itself, jurisdiction ends with Michigan waters.

Engineering-wise, it appears entirely feasible for commercial vessels to provide secondary treatment on board with some retention capacity of treated effluent for areas such as ports where there may be some discharge restrictions, the treated effluent later being discharged in the open lake away from shore.

The Federal Water Pollution Control Act, as amended by the Water Quality Improvement Act of 1970, Section 13(b), provides that the Secretary of the Interior, after consultation with the Secretary of the department in which the Coast Guard is operating, after giving appropriate consideration to the economic costs involved, and within the limits of available technology, shall promulgate federal standards of performance for marine sanitation devices which shall be designed to prevent the discharge of untreated or inadequately treated sewage into or upon the navigable waters of the United States, from new vessels and existing vessels.

Under date of May 12, 1971, the Environmental Protection Agency published (36 FR 8739) proposed federal standards of performance for marine sanitation devices. (The authority and functions of the Secretary of the Interior under Section 13 were transferred to the administrator of the Environmental Protection Agency by Reorganization Plan No. 3 of 1970). The proposed regulations provide for vessels the equivalent of the secondary treatment standards for municipal waste facilities. Under the proposed regulation, a marine sanitation device which will prevent the discharge of untreated or inadequately treated sewage, is one which will prevent the discharge of an effluent containing visible floating or settleable solids; and from which the effluent, without dilution other than that normally used for flushing purposes, does not contain:

(a) Total coliform bacteria in excess of 240 per 100 ml;

(b) Biochemical Oxygen Demand in excess of 100 mg/1; and

(c) Suspended solids in excess of 150 mg/1.

Thus, the proposed federal regulations, while not finalized, seek to provide for vessels a level of treatment which is the approximate equivalent of the secondary treatment standards imposed by the Environmental Protection Agency and the states on municipal waste treatment facilities.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

The questions presented are so substantial as to require plenary consideration.

On or after January 1, 1971 appellants' federally licensed vessels, not being equipped with either holding tanks or incinerating devices, could not enter Michigan waters except in violation of the Michigan Watercraft Pollution Control Act of 1970. Commercial navigation on the Great Lakes being seasonal in nature, however, there was no immediate problem until the 1971 navigation season opened about mid March. At that time appellants sought and obtained a temporary restraining order against enforcement of the Act. The Trial Court has seized upon the fact that the State has not instigated or threatened criminal prosecutions as justification for abstaining from ruling on the issues. This ignores the fact that the only reason the state has not instigated or threatened criminal prosecutions is because, since the opening of Great Lakes navigation this year, it has been enjoined from doing so.

The Trial Court's Memorandum Opinion is patently inconsistent. It holds, on the one hand, that no judiciable

controversy exists, while, on the other hand, it recommends that appellants seek relief in the Michigan courts through Michigan's declaratory judgment procedures. (Michigan Court Rules, CGR 1963, Section 521). If there is no judiciable controversy, appellants are no more entitled to a declaratory judgment in the state courts than they are in the Federal courts. That there is a judiciable controversy, however, is abundantly clear.

The controversy arises over appellants' legal right to enter Michigan waters without holding tanks or incinerating devices. The conflict of interests is real and ripe for determination. The disagreement between appellants and the State of Michigan is not nebulous or contingent, but has taken on a fixed and final shape so that a court can well see what legal issues it is being requested to decide. That a useful purpose will be achieved in deciding those issues cannot be denied.

None of the cases relied upon by the Trial Court supports its conclusions. *Public Service Commission of Utah et al. v. Wycoff Company, Inc.*, 344 U.S. 237 (1952), did not involve the constitutionality of any statute. In *Wilson v. Schnettler*, 365 U.S. 381 (1961), the appellant was attempting to relitigate in a trial de novo in a federal court the very issue that he had already litigated in the state court.

Dombrowski v. Pfister, 380 U.S. 479 (1965), holds abstention to be appropriate pending a possible narrowing construction by the state courts which would avoid unnecessary constitutional adjudication. Here construction of the state statute is not involved. Its mandate is clear on its face. Litigation in the state courts could serve no useful purpose. The issues are real, the questions practical and not academic. A decision will finally settle and determine the controversy, namely, whether or not appellants'

federally licensed vessels can enter Michigan waters without the necessity of installing holding tanks or incinerating devices.

Moreover, there is no question as to whether a regulation promulgated by a state agency was authorized by a state statute. We readily recognize that if there is no warrant in state law for an agency's assumption of authority there is an end to litigation and the constitutional issue does not arise, but that is not this case. The issue here, pure and simple, is whether Michigan has the legal authority to enact a statute requiring federally licensed vessels to install holding tanks or incinerating devices. We think that issue is so important and so significant as to require plenary consideration.*

After a full evidentiary hearing, oral argument and the submission of briefs, we respectfully submit that the Trial Court abused its discretion in not deciding the issues joined on the pleadings and the evidence.

It is further evident that the Trial Court did not properly apply this Court's decision in *Swift & Co. v. Wickham*, 382 U.S. 111 (1965). That decision holds only that 28 U.S.C. § 2281 is not applicable where an action is brought to enjoin the enforcement of a state statute *solely* on supremacy grounds. Here preemption is only one issue. There are other, equally important, substantial issues involving federal questions. If, however, a district court of

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* The public interest in this issue is demonstrated by the fact that in the trial court briefs amicus curiae were filed in support of appellants by Dominion Marine Association, Canada, The American Institute of Merchant Shipping, et al., The Seafarers International Union of North America, Great Lakes District, A.F.L.-C.I.O., the Maritime Trades Department, A.F.L.-C.I.O., the Michigan State A.F.L.-C.I.O. and the Metropolitan District A.F.L.-C.I.O., and in support of appellees by United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. and the Michigan United Conservation Clubs.

three judges was not proper, the trial court was nevertheless a duly constituted district court and should have proceeded to decide the issues. In any event, it is doubtful that a state court could decide all of the issues in view of the maritime nature of the case. 28 U.S.C. § 1333 provides that:

> "The district courts shall have original jurisdiction, *exclusive of the courts of the state,* of (1) any civil case of admiralty or maritime jurisdiction * * *." (emphasis supplied).

In *Harrison v. NAACP*, 360 U.S. 167 (1959), it is said that federal courts should not adjudicate the constitutionality of state enactments "fairly open to interpretation" until the state courts have been afforded a reasonable opportunity to pass upon them. By the same token, *United States v. Livingston* (ED SC) 179 F. Supp. 9 (1959), affirmed 364 U.S. 281, states, pages 12, 13:

> "Though never interpreted by a state court, if a state statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it."

No state interpretation of the Michigan Watercraft Pollution Control Act of 1970 will avoid or modify the federal constitutional questions raised in this litigation. Section 4 of the Michigan Watercraft Pollution Control Act of 1970 is not fairly open to interpretation. The section is clear and unambiguous in meaning and under no reasonable construction could the constitutional issues here presented be avoided. Directly in point is *City of Altus, Oklahoma v. Carr* (DC WD Tex.), 255 F. Supp. 828 (1966), affirmed 385 U.S. 35. As in that case, appellants' fear or apprehension of prosecution is realistic and this action to declare the Michigan Watercraft Pollution Control Act of

1970 violative of the federal Constitution cannot be deemed to be premature. The very presence of the statute itself and the possibility of its enforcement brings the present case well within the purpose of 28 U.S.C. § 2201. As was said in *Commonwealth of Pennsylvania v. State of West Virginia*, 262 U.S. 553 (1923) page 593:

> "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough."

On the authority of *Harman v. Forssenius*, 380 U.S. 528 (1965), *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), *City of Altus, Oklahoma v. Carr, supra*, and *United States v. Livingston, supra*, appellants urge that the Trial Court abused its discretion in failing or refusing to decide the substantial and important Federal questions raised in this litigation and that such failure or refusal constitutes reversible error.

That the issues raised in this litigation present substantial Federal questions of extreme public importance admits of no doubt.

The preemption question is not only novel but one of first impression. The Congress, in enacting the Water Quality Improvement Act of 1970, embarked upon a comprehensive Federal scheme of pollution control for vessels. After the required standards are promulgated, new vessels are given two years, and existing vessels five years, in which to comply. The Report of the Committee on Public Works of the United States Senate (Report No. 91-351, 91st Congress, 1st Session), accompanying S. 7, the companion bill of H.R. 4148, which ultimately became the Water Quality Improvement Act of 1970, states at page 11:

> "The Committee intends that this new section will assist in preventing at the earliest possible time permitted by existing and advancing technology, eco-

nomics, and other practical considerations, the discharge into the navigable waters of the United States of raw or inadequately treated sewage from vessels."

Can then the states, in this interim period, adopt legislation which completely frustrates the Federal program and impairs Federal superintendence of the field, or does the principle of *San Diego Unions v. Garman*, 359 U.S. 236 (1959) apply?

Is this one of those rare and exceptional cases where a state regulation in the exercise of the police power places such a heavy burden on interstate and foreign commerce, uncompensated by any compelling advantages to the public health and welfare, that it violates the commerce clause of the United States Constitution within the meaning of *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959)? Can the states impose a requirement that Federally licensed vessels install specific pollution control equipment in light of *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926) and *Kelly v. Washington*, 302 U.S. 1 (1937), a question that was not reached in *Huron Cement Co. v. Detroit*, 362 U.S. 440 (1960)?

Does the Michigan Watercraft Pollution Control Act of 1970 destroy the very uniformity in respect of maritime matters which the Constitution was designed to establish, and which this Court has long endeavored to protect in decisions such as *Butler v. Boston & Savannah Steamship Co.*, 130 U.S. 527 (1889), *The Lottawanna*, 21 Wall. (88 U.S.) 558 (1874), *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917) and *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920)? It is recognized that the requirements of uniform maritime law do not completely usurp the state police power, but no state legislation is valid if it contravenes the essential purposes of, or works material prej-

udice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. Such a limitation at least is essential to the fundamental purposes for which such law was incorporated into our national laws by the Constitution, and appellants contend that the Michigan Act goes way beyond these bounds.

Concerning due process and equal protection of the laws, there are substantial questions raised on the record, including but not limited to, whether the Michigan Act is arbitrary, unreasonable and capricious in that the means selected, i.e. holding tanks or incinerating devices, bear no real and substantial relationship to the objective to be achieved, i.e. the protection of the public health and welfare of the citizens of Michigan; is the Michigan Act reasonably calculated to attain the desired objective when holding tanks or incinerating devices installed in compliance with the Act will become wholly obsolete or otherwise worthless upon the effective date of the Federal standards, and there are no pump out facilities in Michigan or elsewhere suitable for commercial vessels so that the objective of the Michigan Act cannot be accomplished; with respect to those vessels which already have secondary waste treatment systems can Michigan require that they abandon those systems and pump into municipal facilities which provide at best only primary treatment?

Appellants urge that there are substantial federal questions of great public importance above and beyond that of preemption involved in this litigation. There is no way in which the Michigan Watercraft Pollution Control Act of 1970 can be construed so as to avoid those issues. A real controversy exists that is ripe for decision and 28 U.S.C. § 2201 provides an appropriate remedy.

CONCLUSION.

It was the duty of the trial court to decide the issues joined on the pleadings and the evidence. In failing to do so, reversible error was committed and appellants respectfully pray that the Court assume jurisdiction and reverse the decision below.

Respectfully submitted,

SCOTT H. ELDER,
2700 Terminal Tower,
Cleveland, Ohio 44113,
Attorney for Appellants.

Of Counsel:
JOHNSON, BRANAND & JAEGER,
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APPENDIX A.

Civil Action No. 36194

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

LAKE CARRIERS' ASSOCIATION and AMERICAN STEAMSHIP COMPANY, *et al.*,

Plaintiffs,

vs.

RALPH A. MacMULLAN, *et al.*,

Defendants.

MEMORANDUM OPINION.

(Dated July 12, 1971.)

Before EDWARDS, Circuit Judge, and KEITH and PRATT, District Judges.

PRATT, District Judge:

Plaintiffs in this proceeding are the Lake Carriers' Association and 19 of its 21 member companies who own and operate Great Lakes cargo vessels. Defendants are the Attorney General of the State of Michigan, the Michigan Department of Natural Resources and its Director and the Michigan Water Resources Commission and its Executive Secretary.

The complaint seeks a declaratory judgment holding that the Michigan Water Pollution Act of 1970 (Act 167 of Public Acts of 1970) is constitutionally infirm and conflicts with federal legislation, and correspondingly, requests that the State of Michigan be enjoined from enforcing that Act.

A three judge Court was convened pursuant to Section 2284 of Title 28 of the United States Code and a hearing was conducted on April 26 and 27, 1971.

The plaintiffs present five major issues as the basis for relief:

1. That the federal government has pre-empted the field of pollution control in the waters of the Great Lakes and that the Michigan Water Pollution Act conflicts with a federal statute, specifically (Water Pollution Control Act as amended by the Water Quality Improvement Act of 1970, 33 U.S.C. Sec. 1151 et seq.); the said federal statute manifests the intention of the federal government to occupy the field exclusively; and that federal vessel inspection laws, administered by the U. S. Coast Guard, preclude state prescription of shipboard equipment.

2. That the Michigan Water Pollution Act places an undue burden on interstate commerce.

3. That the Michigan Water Pollution Act interferes materially with uniform maritime law.

4. That the Michigan Water Pollution Act denies plaintiffs due process and the equal protection of the laws.

5. That the language and provisions of the Michigan Water Pollution Act are unconstitutionally vague and, thus, unenforceable.

Great Lakes shipping can be characterized as a large, vital and sophisticated industry. It traverses all of the Great Lakes, the connecting waterways and tributaries and touches upon the states of Minnesota, Wisconsin, Illinois, Indiana, Michigan, Ohio, Pennsylvania and New York and the Canadian provinces of Ontario and Quebec. The advent of the St. Lawrence Seaway System provides an international flavor to shipping on the Great Lakes.

As an example of the size and scope of the industry, as of January 1, 1970, there were a total of 442 vessels in excess of 1,000 tons on the Great Lakes. Of this total, 263 were vessels of United States Registry, having a combined

tonnage of 1,802,776 gross tons, and 179 were vessels of Canadian Registry having a combined tonnage of 1,576,-165 gross tons. Flow charts indicate that the total commerce of the lakes in 1964 was 210,830,576 short tons with the primary commodities being iron ore, coal, grain, stone, petroleum, cement and sand and gravel. Of this commerce, about one-third (approximately 72 million short tons) utilizes or touches Michigan ports. A resume of trade patterns and courses shows that Great Lakes cargo vessels cross and criss-cross during the shipping season from a great variety of ports within the Great Lakes waterway system, and may enter a particular state's waters frequently without touching at a port in that state. Generally, if recommended navigational courses are followed, the vessels do not, while traversing open waters come within three miles of land except when entering or leaving a port or when in a connecting waterway.

A typical or average Great Lakes cargo vessel would be between 500 and 600 feet in length, have a gross tonnage of 7,500 tons and a carrying capacity of 12,000 gross tons. It is a flat-decked vessel except for the "houses" fore and aft where are located the crew quarters, machinery, supplies, navigational and other equipment necessary to the operation of the vessel. The center length of the vessel is devoted to cargo. Crew sizes range from 30 to 35 men per vessel and it is estimated each man daily generates 125 gallons of liquid waste (including wash and bathing water and sanitary flush water).

Recognizing the need for pollution control devices and systems, a part at least of the Great Lakes shipping industry has taken some steps in the direction of reducing the discharge of pollutants. Approximately 30 ships have installed a macerating-chlorinating system and another 26 (including four Canadian registry vessels) have installed

biogest systems. Other systems are also being tried empirically aboard some vessels, and are of the incinerating or of the "package-treatment plant" type.

It is within the foregoing context that the State of Michigan enacted the Water Pollution Control Act of 1970, and began its implementation by, first, enforcing the requirements relating to pleasure craft and then by approaching the owners and operators of Great Lakes cargo vessels in order to obtain compliance with the provisions of the Act.

The Water Pollution Control Act of 1970 (a copy of which is attached hereto as Appendix A), as particularly pertinent here, provides that:

> Sec. 3. (1) A person shall not place, throw, deposit, discharge or cause to be discharged into or onto the waters of this state, any litter, sewage, oil or other liquid or solid materials which render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes.

and,

> Sec. 4. (2) A person owning, operating or otherwise concerned in the operation, navigation or management of a watercraft having a marine toilet shall not own, use or permit the use of such toilet on the waters of this state unless the toilet is equipped with 1 of the following pollution control devices:
>
> (a) A holding tank or self-contained marine toilet which will retain all sewage produced on the watercraft for subsequent disposal at approved dockside or onshore collection and treatment facilities.
>
> (b) An incinerating device which will reduce to ash all sewage produced on the watercraft. The ash shall be disposed of onshore in a manner which will preclude pollution.

> Sec. 11. Any person who violates any provision of this act is guilty of a misdemeanor and shall be fined not more than $500.00. To be enforceable, the provision or the rule shall be of such flexibility that a watercraft owner, in carrying out the provision or rule, is able to maintain maritime safety requirements and comply with the federal marine and navigation laws and regulations.

From the above provisions, it appears that the legislature of the State of Michigan sought to draw a distinction between the discharge of "noxious" materials and the discharge of "sewage" (defined in Section 2(d) as ". . . all human body wastes, treated or untreated."), in the latter instance requiring either a holding tank or an incinerating device, whereas in the former the prohibition does not proscribe the discharge of "treated" material.

As a result of the overtures of state officials, with the aim of establishing voluntary compliance within a reasonable time, some ship owners have installed holding tanks to control sewage discharge; for example, Ford Motor Company has installed two 1,000 gallon holding tanks on each of its six vessels at a cost of approximately $20,000.00 per vessel. The Ford vessels' holding tanks are pumped out at the Ford dock when the ships return to their port by the utilization of septic tank pump-out trucks at a cost of between $50.00 and $70.00 per ship.

The latter finding points up a significant feature, that is, that Michigan has, as yet, provided no pump-out facilities at any of its ports, although it is anticipated that arrangements with municipal authorities or others (including dock owners and ship owners or operators with their own docks) will establish a network of such facilities.

Against this background is superimposed the entry of the federal government by virtue of the Water Quality Improvement Act of 1970, *supra*, which has as one of its

major purposes pollution control of navigable waters, including the Great Lakes system.

In paraphrase, the federal Act provides that as soon as possible after April 3, 1970, the Secretary of Interior shall promulgate federal standards of performance for marine sanitation devices which shall be designed to prevent the discharge of untreated or inadequately treated sewage into or upon the navigable waters of the United States. (Section 1163 ~~(b)~~ (1).) The Act also provides that initial standards and regulations shall become effective for new vessels two years after promulgation and for existing vessels five years after promulgation. (Section 1163 (c) (1).) Subsection (f) of Section 1163 prohibits any state from enforcing any statute or regulation with respect to the design, manufacture, or installation or use of any marine sanitation device on any vessel subject to the section after the effective date of the initial standards and regulations promulgated under the section. A state may, however, apply to the Secretary for a regulation prohibiting the discharge of *any* sewage into waters of that state. (Emphasis supplied.)

There is no dispute that the vessels and waters covered by the Federal Act are the same vessels and waters which are the subject matter of this case. The cause of plaintiffs' anxiety and apprehension is not, however, limited to the alleged conflict between the Federal Act and the Michigan Act. For example, pollution control of the waters of the Great Lakes has been a matter of discussion between the governments of the United States and Canada and specific reference has been made to the problem of achieving compatible regulations governing waste disposal by commercial vessels. (Ex. 23, Communique of the Canada/United States Ministerial Meeting on Great Lakes Pollution, June 23, 1970); the Canadian

government has circularized to the shipping industry proposed regulations governing sewage and garbage disposal on the Great Lakes waters within its boundaries (Ex. 22); in early 1968, Federal authorities met with representatives of Lake Michigan states regarding pollution control of that Lake and it was there recognized that sewage disposal directly into Lake Michigan waters was a distinct threat to the quality of the Lake (Ex. 21); a bill has been introduced into the Wisconsin legislature which purports to regulate sewage discharge from commercial vessels into the waters of that state (Exhibit D).

Adding to the uncertainties created by the foregoing is the expressed fear of the plaintiffs that Michigan may, administratively or judicially, interpret its statutes to require that Great Lakes vessels install huge holding tanks of a capacity (40,000 gallons) that would retain for eventual pumping out *all* materials, fluids and substances generated by and on a vessel.

Inherent, then, in this situation, assert the plaintiffs, is the real possibility that each of the governmental units involved, if left to their own devices, would promulgate different, conflicting standards, prohibitively costly and structurally dangerous and, presumably, each statute with a criminal penalty.

But with a recitation of what is, should be coupled a recitation of what is not. In that balance sheet lies the real crux of the issues presented and the role of this Court.

The pollution of our environment has become a major problem of our society. There is hardly an industry, a governmental unit, a citizens' organization—nor even a person—who is not daily confronted with dire warnings regarding the danger confronting our ecology if corrective and reparative steps are not taken immediately.

There are few dissenters and conflicts appear to arise only as to timetables, methods and expense. Investigations, studies, reports, surveys and conferences abound.

Michigan has chosen to promulgate a program, which is original within the Great Lakes region as it respects lakes pollution. No other state, province or national government has, as yet, instituted a Great Lakes pollution control program although certainly each is involved and concerned. The significant factor is, however, that the plaintiffs here request relief on the basis of an *anticipation* that other governmental units will act, presumably in the imminently near future and that such action will in fact conflict with Michigan standards.

Further, although the plaintiffs asserted that the Michigan statute might or could be interpreted to require holding tanks of 40,000 gallon capacity, there is no substantial grounds for that assertion, particularly in view of the stated position of Michigan authorities that the holding tank provision is aimed at the elimination of the practice of discharging *human wastes* into Michigan waters.

Primary in the factual picture and, therefore, paramount in the Court's consideration, is the attitude of Michigan authorities who seek the cooperation of the industry in the implementation of its program and have not instigated, nor does it appear, threatened criminal prosecutions.

It is this consideration that gives us the starting point of our discussion of the issues.

Wilson v. Schnettler, 365 U.S. 381, provides a succinct guideline regarding the role of the federal courts vis a vis state courts, when Justice Whittaker wrote (at page 385):

> There is still another cardinal reason why it was proper for the District Court to dismiss the com-

plaint. We live in the jurisdiction of two sovereignties. Each has its own system of courts to interpret and enforce its laws, although in common territory. These courts could not perform their respective functions without embarrassing conflicts unless rules were adopted to avoid them. Such rules have been adopted. One of them is that an accused "should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial." *Ponzi v. Fessenden*, 258 U.S. 254, 260. Another is that federal courts should not exercise their discretionary power "to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent . . . ." *Douglas v. City of Jeannette, supra*, at 163.

A later exposition of the principle is contained in *Dombrowski v. Pfister*, 380 U.S. 479, where it was said (pages 484, 485):

". . . considerations of federalism have tempered the exercise of equitable power, for the Court has recognized that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework. It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings."

The impact of *Wilson* and *Dombrowski* is a prevading one, particularly, as here, where dealing as we are with a penal statute, prosecution has not been instituted and threatened prosecution does not appear imminent. (See

Doe v. Randall, 314 F. Supp. 32, D. Minnesota, aff'd *Hodgson v. Randall,* 39 L. W. 3505.)

Nor is there any intimation that the "necessary operation" of state court machinery would prevent a fair trial.

On the contrary, there is every reason to believe that the Michigan court system, with its declaratory judgment procedures (Michigan Court Rules, GCR 1963, Section 521) provide full and adequate machinery to insure a fair hearing of plaintiffs' cause. More importantly, there is every reason to believe that the Michigan courts are eminently qualified to apply constitutional standards studiously and assiduously in their determinations regarding the validity of state statutes.

Reviewing the issues framed previously, there appears to this Court to be compelling reasons to abstain from consideration of the matter in its present posture.

With regard to pre-emption, the Supreme Court in *Swift & Co. v. Wickham,* 382 U.S. 111, held that Supremacy Clause cases are not within the purview of a three judge court.

With regard to the other issues, the lack of a justiciable controversy precludes entry of this Court into the matter. No prosecution is pending, nor threatened which would realistically infer that plaintiffs in a trial of a case would be denied the benefits of the Due Process and Equal Protection clauses or that a State court would not consider the other constitutional issues with circumspection and thoroughness in the usual and normal course.

An overview of the factual situation presented by the evidence in this case compels but one conclusion: that the plaintiffs here are seeking an advisory opinion that would have the effect of prohibiting any state action in the field of Great Lakes water pollution until such time as the federal government manifests its intention and takes

control. This the Court declines to do, especially upon reflection of the clear direction given by the Supreme Court in *Public Service Commission of Utah, et al., v. Wycoff Company, Inc.*, 344 U.S. 237, which involved an interestingly similar situation.

Summarizing the case before it, the Supreme Court said (page 245):

> "In the first place, this dispute has not matured to a point where we can see what, if any, concrete controversy will develop. It is much like asking a declaration that the State has no power to enact legislation that may be under consideration but has not yet shaped up into an enactment."

And went on to say (pages 247, 248):

> "Declaratory proceedings in the federal courts against state officials must be decided with regard for the implications of our federal system. State administrative bodies have the initial right to reduce the general policies of state regulatory statutes into concrete orders and the primary right to take evidence and make findings of fact. It is the state courts which have the first and the last word as to the meaning of state statutes and whether a particular order is within the legislative terms of reference so as to make it the action of the State. We have disapproved anticipatory declarations as to state regulatory statutes, even where the case originated in and was entertained by courts of the State affected. *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450. Anticipatory judgment by a federal court to frustrate action by a state agency is even less tolerable to our federalism. Is the declaration contemplated here to be *res judicata*, so that the Commission cannot hear evidence and decide any matter for itself? If so, the federal court has virtually lifted the case out of the State Commission before it could be heard. If not, the federal judgment serves no useful purpose as a final determination of rights.

The procedures of review usually afford ample protection to a carrier whose federal rights are actually invaded, and there are remedies for threatened irreparable injuries. State courts are bound equally with the federal courts by the Federal Constitution and laws. Ultimate recourse may be had to this Court by certiorari if a state court has allegedly denied a federal right.

In this case, as in many actions for declaratory judgment, the realistic position of the parties is reversed. The plaintiff is seeking to establish a defense against a cause of action which the declaratory defendant may assert in the Utah courts. Respondent here has sought to ward off possible action of the petitioners by seeking a declaratory judgment to the effect that he will have a good defense when and if that cause of action is asserted. Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action. Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law. *Tennessee v. Union & Planters' Bank,* 152 U.S. 454; *The Fair v. Kohler Die & Specialty Co.,* 228 U.S. 22; *Taylor v. Anderson,* 234 U.S. 74."

For the foregoing reasons, this Court will abstain from further consideration of the matter.

The Court is mindful of the recent action of the Environmental Protection Agency which on May 12, 1971, published a "Notice of Proposed Rule Making." The Notice announces that the Agency proposed to amend 18 CFR Part 640 by the promulgation of marine sanitation standards which would permit the use of described treatment devices. Holding tanks or incinerating devices are not required under the proposed standards. The Notice also provides that interested persons may submit views, comments and recommendations concerning the proposed standard to the Agency within 45 days of publication of the Notice.

Defendants have conceded that pre-emption would take place when the initial standards and regulations become effective. Certainly the current action of the Environmental Protection Agency must be carefully considered by the defendants in the interpretation and enforcement of the Michigan statute. This circumstance serves to emphasize the reluctance and declination of the Court to intrude into a matter which is yet unformed.

The temporary restraining order heretofore entered is dissolved and the complaint dismissed without prejudice to plaintiffs to institute other appropriate judicial proceedings.

GEORGE C. EDWARDS, JR.,
United States Circuit Judge,

DAMON J. KEITH,
United States District Judge,

PHILIP PRATT,
United States District Judge.

Dated: July 12, 1971.

APPENDIX B.

Civil Action No. 36194.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

LAKE CARRIERS' ASSOCIATION
and
AMERICAN STEAMSHIP COMPANY, *et al.*,
Plaintiffs,

vs.

RALPH A. MacMULLAN, *et al.*,
Defendants.

TEMPORARY RESTRAINING ORDER.

(Issued March 16, 1971.)

This cause came on to be heard on plaintiffs' verified complaint and the affidavit submitted therewith and all parties being represented by counsel and it appearing to the Court that the defendants are about to commit acts as set forth in plaintiffs' complaint, and will continue to do so unless restrained by order of this Court, and that immediate and irreparable injury, loss or damage will result to plaintiffs unless a temporary restraining order is issued in that plaintiffs are the owners and/or operators of Great Lakes commercial, bulk cargo vessels engaged in interstate and foreign commerce, and as such, are obligated and required to provide transportation service on the Great Lakes, and enforcement of the Michigan Watercraft Pollution Control Act of 1970, the same being Act 167, Public Acts of 1970, State of Michigan, will

prevent plaintiffs from carrying on their business of transportation by imposing fines and penalties for the alleged violation of the aforesaid Act so that plaintiffs cannot operate their vessels, it is

ORDERED, that Ralph A. MacMullan, individually and as Director of the Michigan Department of Natural Resources; Ralph W. Purdy, individually and as Executive Secretary of the Water Resources Commission; and Frank J. Kelly, individually and as Attorney General of the State of Michigan, their agents, servants, employees and attorneys, and all persons in active concert and participation with them, be and they hereby are restrained from in any manner, either directly or indirectly, interfering with the plaintiffs in the operation of their federally licensed vessels through enforcement of the Michigan Watercraft Pollution Control Act of 1970; and it is further

ORDERED, that this order expire within 10 days after entry unless within such time the order for good cause shown is extended; or unless the defendants consent that it may be extended for a longer period; and it is further

ORDERED, that copies of this order and of plaintiffs' complaint and affidavit submitted therewith, together with proper summons issuing by the clerk of this Court, be immediately served by the United States Marshal upon the defendants.

ISSUED AT 5:45 P.M., March 16, 1971.

RALPH M. FREEMAN,
United States District Judge.

APPENDIX C.

Civil Action No. 36194.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION.

LAKE CARRIERS' ASSOCIATION
and
AMERICAN STEAMSHIP COMPANY, *et al.*,
Plaintiffs,

vs.

RALPH A. MacMULLEN, *et al.*,
Defendants.

ORDER.

(Filed March 26, 1971.)

It appearing that due to the Court's schedule, the earliest this cause can be heard is April 19, 1971 at 2:00 p.m., and such appearing to be good cause for extending the Temporary Restraining Order entered at 5:45 p.m., March 16, 1971. Now, therefore, it is

ORDERED, that the Temporary Restraining Order, entered at 5:45 p.m., March 16, 1971, is hereby extended until the hearing of plaintiffs' application for interlocutory injunction.

RALPH M. FREEMAN,
United States District Judge.

APPENDIX D.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION.

(Title omitted in printing.)

MOTION FOR INJUNCTION PENDING APPEAL.

Plaintiff moves the court for an order continuing the temporary restraining order or temporary injunction pending appeal to the Supreme Court of the United States and until determination thereof and shows the court as follows:

1) On March 16, 1971, plaintiff filed a complaint herein which sought judgment permanently enjoining the State of Michigan from enforcing Act 167, Public Acts of 1970, State of Michigan, which requires that holding tanks or incinerating devices to be installed on plaintiffs' vessels.

2) On March 16, 1971 this court upon the motion of plaintiffs entered a temporary restraining order restraining defendants from directly or indirectly interfering with plaintiffs in the operation of their federally licensed vessels through enforcement of Act 167, Public Acts of 1970, State of Michigan, pending decision on the merits by this court.

3) On July 12, 1971 final judgment, wherein the complaint was dismissed without prejudice, was entered by this court.

4) On July 29, 1971 plaintiffs duly filed in this court a notice to appeal from said final judgment to the Supreme Court of the United States.

5) Plaintiffs' appeal involves difficult questions of constitutional law regarding the application of Act 167,

Public Acts of 1970, State of Michigan, to plaintiffs' vessels, in that said Act, (a) contravenes the essential purposes of and works material injury to characteristic features of the maritime law and interferes with its proper harmony and uniformity, (b) interferes with federal superintendence of a field where uniformity is necessary and relates to a subject demanding exclusive federal regulation, (c) places an undue burden on interstate commerce, (d) denies plaintiffs due process and the equal protection of the laws, (e) conflicts with existing federal statutes, namely, the Federal Water Pollution Control Act, as amended by the Water Quality Improvement Act of 1970, which manifests the intent of the federal government to occupy the field exclusively, and the vessel inspection laws which preclude state prescription of shipboard equipment, and (f) is so vague in its language and provisions as to be constitutionally unenforceable.

6) Unless, pending plaintiffs' appeal to the Supreme Court of the United States, the temporary restraining order or preliminary injunction heretofore granted is continued in full force and effect, irreparable damage will result to the plaintiffs should Michigan proceed to enforce its Act and said judgment then be reversed on appeal. Unless said temporary restraining order or temporary injunction is continued, plaintiffs will be compelled to expend large sums of money making permanent structural alterations to their vessels pending determination of the constitutional validity of the Michigan Act.

SCOTT H. ELDER,
Attorney for Plaintiffs Appellant.

APPENDIX E.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

(Title omitted in printing.)

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR INJUNCTION PENDING APPEAL.

Plaintiffs have moved the Court for an order continuing the temporary restraining order or temporary injunction entered on March 16, 1971 pending final determination of their appeal to the United States Supreme Court pursuant to Section 1253 of Title 28 of the United States Code.

It was early held in the famous *Slaughter House Cases,* 10 Wall. 273 (1869), that an appeal from a decree granting, refusing or dissolving an injunction is not suspended in its effect by an appeal, but that the court below has power, if the purposes of justice require it, to order a continuance of the status quo until a decision shall be made by the appellate court or until that court should order to the contrary. In *Hovey v. MacDonald,* 109 U.S. 150, 161 (1883), the power of the District Court to order a stay was again recognized and it was said that this power should always be exercised when an irremedial injury may result from the effect of the decree as rendered. In fact, the Supreme Court reprimanded the District Court for not taking such action which it felt "eminently proper" under the circumstances of the case.

Scripps-Howard Radio, Inc. v. Federal Communications Commission, 316 U.S. 4 (1941), points out that the power of a district court to grant an injunction to maintain

the status quo pending appeal was first codified in the Judiciary Act of 1789, the pertinent section of which is now Section 1651 of Title 28 of the United States Code, section (a) of which provides:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Scripps-Howard Radio, Inc. v. Federal Communications Commission, supra, emphasizes that between lower and upper courts a court of review exhausts its power when it lays bare a misconception of law and compels correction, but judicial review becomes an idle ceremony if the situation is irreparably changed before the correction can be made. It has always been held, therefore, said the court, pages 9, 10:

> "* * * that as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal. * * *".

and, continued the court, quoting *Virginia Ry. Co. v. United States,* 272 U.S. 658, 672-73:

> "The propriety of its issue is dependent upon the circumstances of the particular case."

Thus, while it is generally the rule that when an appeal is perfected the district court loses jurisdiction to take further action in the cause, the power of a district court to grant an injunction after appeal to preserve the status quo is a long established exception. *United States v. El-O-Pathic Pharmacy* (9 CA), 192 F.2d 62, 79 (1951).

In recognition of the exception, subdivision (c) of Rule 62, Federal Rules of Civil Procedure, 28 U.S.C., provides:

(c) *Injunction Pending Appeal.* When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges evidenced by their signatures to the order."

It is recognized that a stay pending appeal is not a matter of right and that there must be a demonstrable need, based on good and sufficient reasons, for the trial court to maintain the status quo.

In *Magnum Import Co. v. Coty,* 262 U.S. 159 (1923), Chief Justice Taft established guidelines for granting stays which have withstood the years. The initial test is whether the balance of convenience requires a suspension of the decree and a withholding of its mandate. In striking that balance, the courts have usually considered factors such as whether the failure to maintain the status quo will render the appeal moot. *Chicago & N.W. Ry. Co. v. United Transports Union,* (7 CA) 422 F.2d 979 (1970); *Pettway v. American Cast Iron Pipe Company,* (5 CA) 411 F.2d 998 (1969); whether the petitioners are likely to prevail on the merits of their appeal; whether petitioners will suffer irreparable injury unless a stay is granted; whether a stay would substantially harm other parties; and finally, where lies the public interest. *Virginia Petroleum Job Association v. Federal Power Commission,* (DCCA) 259 F.2d 921, 923 (1958); *Belcher v. Birmingham Trust National Bank,* (5 CA) 395 F.2d 685 (1968); *Dewey v. Reynolds*

Metals Company, (WD Mich. SD) 304 F. Supp. 1166 (1969).

Plaintiffs respectfully submit that under the circumstances of this case it would be an abuse of the Court's discretion not to render a stay.

Failure to Grant a Stay Will Render Plaintiffs' Appeal Moot.

The Court, in its memorandum opinion of July 12, 1971, recognizes that the Federal Water Pollution Control Act, as amended by the Water Quality Improvement Act of 1970, 33 U.S.C. § 1151 et seq., contemplates flow through waste treatment devices and that when the standards, now in the process of promulgation under that Act, become effective, complete federal preemption will take place. If, however, Michigan is permitted to begin immediately to enforce its law, plaintiffs' appeal to the United States Supreme Court will be rendered moot and meaningless because plaintiffs will have to begin to install holding tanks or incinerating devices on their vessels. In turn, any standards promulgated under the Federal Act will be equally meaningless because vessel operators will be compelled to equip their vessels in accordance with Michigan law rather than the Federal Act.

It is true that Michigan has not instigated any criminal prosecutions, but this is only because the temporary restraining order was entered on March 16, 1971 when the Great Lakes shipping season was about to open, as evidenced by the affidavit of Vice Admiral, Paul E. Trimble, U.S.C.G. Ret., President, Lake Carriers' Association, attached to plaintiffs' original complaint. If now the injunction is lifted there is every reason to believe that the state will proceed with criminal prosecutions and that plaintiffs will have to defend numerous prosecutions in the state courts.

Michigan, throughout its testimony in this case, has attempted to create the impression that it wants to cooperate with the vessel owners, but the state's concept of cooperation is the immediate installation of holding tanks or incinerating devices. Michigan insists upon immediate compliance with its act and, should it ultimately be established on appeal that the Michigan act is invalid for any reason, that determination will be of no benefit to plaintiffs because they will have already been forced to adopt a program of installing holding tanks or incinerating devices.

The situation is not unlike that which arose in *Chicago & N.W. Ry. Co. v. United Transportation Union, supra,* involving a crew consist controversy. There the question was whether the procedures of the Railway Labor Act had been exhausted, thereby authorizing the exercising of self-help in the form of a strike. It was held that even though the Norris-LaGuardia Act did not permit an injunction, the district court had power to grant an injunction to preserve the status quo because to permit a strike would moot the appeal. By like token, to now permit the state of Michigan to require that vessel operators proceed to install holding tanks or incinerating devices will moot their appeal.

Plaintiffs Are More Than Likely to Prevail Upon the Merits of Their Appeal.

With all due respect to the Trial Court, plaintiffs are firmly of the belief that substantial error was committed and that they will prevail upon appeal.

The Court, in its memorandum opinion of July 12, 1971, appeared to emphasize that it was the program of Michigan to establish voluntary compliance within a reasonable time frame; that public officials of Michigan had

approached the owners and operators of Great Lakes cargo vessels in order to obtain compliance with the provisions of the act; that because it is the attitude of Michigan authorities to seek the voluntary cooperation of the industry in the implementation of a program and have not instigated or threatened criminal prosecutions, the Court should not intrude into a matter which is yet unformed.

The Court, having erected the foregoing parameters around this case, has brought itself squarely into conflict with *Bush v. Martin* (DC SD Texas), 224 F. Supp. 49 (1964). In that case the constitutionality of a Texas statute apportioning congressional districts among the counties and citizens of the state was in issue. A three judge district court held the statute unconstitutional and enjoined its enforcement. The two salient defenses raised by the state were the same as in this case, namely, that relief could be obtained elsewhere, i.e., the state courts, and the more appealing defense of postponing judicial relief to "let us work this out." Circuit Judge John R. Brown, in a well reasoned but caustic opinion, stated that there is no basis whatsoever in law for staying the hand of equity on the ground that relief can be elsewhere or otherwise obtained. Further, he held that the state officials, defendants in an action challenging the validity of a state statute, are not in a position to advance as a basis for postponing judicial relief the defense of "let us work this out."

Plaintiffs do not contend that the Michigan court system, with its declaratory judgment procedures, is in any way inadequate or unable to insure a fair hearing. They do contend, however, that as a matter of right they are entitled to invoke the jurisdiction of a three judge Federal district court and that the so-called willingness or

overtures of state officials to "let us work this out" in no way defeats federal jurisdiction where the constitutionality of a state statute is involved. Because the Court's decision in this case is squarely in conflict with *Bush v. Martin, supra,* plaintiffs are confident that the Court's decision will be reversed upon appeal. *Bush v. Martin* was affirmed, 376 U.S. 222.

While it is true that the plaintiffs, in a limited sense, as hereinafter appears, could have invoked state jurisdiction under the Michigan court rules, it is also true that this Court has original jurisdiction of all civil actions wherein an injunction is sought which arises under the Constitution, laws or treaties of the United States. 28 U.S.C. §§ 1331, 2201, and 2281. Plaintiffs, as a matter of right, are entitled to invoke that jurisdiction.

Moreover, it is extremely doubtful that plaintiffs could receive full relief in the state courts because of the important issue as to whether or not the Michigan Act contravenes the essential purposes of and works material injury to the characteristic features of the maritime law. Section 1333 of Title 28 of the United States Code provides that:

> "The District Courts shall have original jurisdiction, *exclusive of the courts of the state,* of (1) any civil case of admiralty or maritime jurisdiction. * * *" (Emphasis supplied.)

Thus, it is most doubtful that the state courts would have jurisdiction to determine the question of a conflict with maritime law and it is most probable that on this issue the Trial Court will be reversed.

In yet another vein, it is clear that the Trial Court has misconstrued the Supreme Court's decision in *Swift & Co. v. Wickham,* 382 U.S. 111 (1965). That decision holds that if the immediate controversy is not the unconstitution-

ality of a state law but merely the construction of a state law or the federal law, the three judge requirement does not become operative. In essence, the court held that no suit, resting *solely* on a question of preemption and thus on "supremacy" grounds, falls within the statute. That is not this case. Preemption is only one issue. In addition, there are substantial issues as to the constitutionality of the Michigan act involving maritime law, the interstate commerce clause and the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States.

Even were the Court correct, however, in its interpretation of *Swift & Co. v. Wickham, supra,* then and in that event the Court, although composed of three judges, was a duly constituted district court and had jurisidction to decide the issues from which appeal would lie to the Sixth Circuit Court of Appeals. Plaintiffs are confident that the Supreme Court will conclude that the Trial Court erred in abdicating its responsibility on the basis of *Swift & Co. v. Wickham, supra.*

In all due respect, plaintiffs further believe that the Trial Court committed reversible error in abstaining from deciding the issues of this case. The abstention doctrine originated in Justice Frankfurter's opinion in *Railroad Commission of Texas v. Pullman Company,* 312 U.S. 496 (1941). That case involved the single question as to whether a regulation promulgated by the state Railroad Commission was authorized by the Texas statute. In such an instance, it is perfectly logical to defer interpretation of a state statute to a state court because, if there is no warrant in state law for the commission's assumption of authority, there is an end to litigation and the constitutional issue does not arise. That is not this case. Here the question is whether the state statute itself conflicts

with the Constitution. Thus, there is no issue of state law as such, nor is there a question as to the authority of the Michigan Water Resources Commission.

Moreover, the Trial Court erred in its application of the abstention doctrine because the Supreme Court did not hold in *Railroad Commission of Texas v. Pullman Co., supra,* that the Trial Court could completely abdicate its jurisdiction. Instead, the Supreme Court remanded the cause to the district court with directions to retain the bill pending a determination of proceedings to be brought with reasonable promptness in the state court. We earnestly submit that the Trial Court committed reversible error in abdicating its original jurisdiction and that, even if it was within the court's discretion to apply the abstention doctrine, it had no right, as a matter of law, to dismiss the complaint but should have retained jurisdiction pending proceedings in the state court.

Nor is there any merit to the Trial Court's finding that the lack of a judiciable controversy precludes entry of the Court into the matter. No prosecution of the plaintiffs was pending or threatened because the Court, prior to the opening of the navigation season, had issued an injunction against such prosecution. The state law speaks for itself. It requires that before a commercial vessel enters Michigan waters it install either holding tanks or an incinerating device. Whether or not Michigan prosecutes the plaintiffs, the fact remains that they cannot enter Michigan waters absent such devices except in violation of Michigan law. That is the controversy and the plaintiffs have every right to invoke the jurisdiction of this Court to determine whether or not that statute is valid.

Whether or not a state court would consider the constitutional issues with circumspection and thoroughness is not the issue. Plaintiffs have the utmost confidence in

the Michigan courts. Nevertheless, this is a case arising under the Constitution and laws of the United States within the meaning of 28 U.S.C. § 1333, of which the district courts have original jurisdiction *exclusive of the courts of the states.* This Court cannot refuse to decide a civil case of admiralty or maritime jurisdiction, and plaintiffs having raised the issue of the conflict of the Michigan statute with the uniform maritime law, the Court cannot apply the doctrine of abstention, even were it applied properly, because of the admiralty and maritime features of this case.

For these reasons, plaintiffs believe they will prevail upon the merits on appeal. The constitutional issues raised in the pleadings are ripe for decision and plaintiffs are confident that the Supreme Court, in its wisdom, will not hesitate to rule upon those issues in plaintiffs' favor.

Plaintiffs will Suffer Irreparable Injury Unless a Stay is Granted.

Unless a stay pending appeal is granted in this cause, plaintiffs will suffer irreparable injury because they will be compelled to proceed with the installation of holding tanks of undetermined size for which there are no pump out facilities available in Michigan or elsewhere. This action was not brought in anticipation that other state governmental units will act in the immediate near future and that such action will, in fact, conflict with Michigan standards. The fact remains that no matter what other states do, if the temporary injunction in this case is dissolved, plaintiffs' vessels cannot enter Michigan waters except in violation of law unless they install holding tanks or incinerating devices. Thus, what other state laws may or may not provide is wholly immaterial. Plaintiffs' apprehensions are not anticipatory nor are they based

solely on speculation. Defendants, while purporting, on the one hand, to seek the voluntary cooperation of plaintiffs, assert, on the other hand, that there are no grounds to warrant further delay in enforcement of the state statute.

Unless this Court continues the temporary restraining order originally entered on March 16, 1971, plaintiffs are confronted with tearing out perfectly good waste treatment systems on some 52 vessels which are superior to present day municipal waste treatment systems in Michigan, and installing holding tanks which ultimately must be pumped out in the lake because there are no pump out facilities in Michigan or elsewhere. Thus the vessel operators are completely thwarted in their attempt to comply with the federal program.

Plaintiffs earnestly urge that it is the duty of this Court to maintain the status quo by continuing the temporary restraining order until the constitutional issues involved in this litigation have been decided by the Supreme Court.

The Granting of a Stay Will Not Result in Substantial Harm to Other Parties.

As emphasized in the Court's memorandum opinion of July 12, 1971, a significant feature of this litigation is that Michigan as yet has not provided any pump out facilities at any of its ports. Neither has the Water Resources Commission determined, by rule or regulation, what is an "approved" pump out facility. Consequently, there can be no harm to the other parties involved in this litigation, namely, the defendants, because the installation of holding tanks or incinerating devices would be a completely futile act. Having failed in its administrative duty, the Water Resources Commission cannot now complain that rein-

statement of the restraining order pending appeal will in any way result in harm to it or the citizens of Michigan, which really leads to the more important inquiry as to wherein lies the public interest.

Imposing a Stay Pending Appeal Would Be in the Public Interest.

The public interest in this case transcends that of the citizens of the state of Michigan. The state of Michigan admits that in the absence of pump out facilities the only alternative for a vessel equipped with holding tanks is to pump out in the waters of another state or one of the provinces of Canada. Thus, Michigan's concept of public interest is to refrain from doing anything in the way of providing pump out facilities while at the same time requiring vessel operators to install holding tanks which must be discharged into the waters of other states.

The vessel operators, on the other hand, want to proceed with a program for the treatment of all wastes and are, in effect, working toward broader pollution control. Plaintiffs are well aware of the deep concern of this Court for the public interest, and plaintiffs are equally aware that such concern is not limited merely to the citizens of Michigan but extends to all who are in any way related to the Great Lakes.

One only needs to read the deposition of Ralph Purdy, Executive Secretary of the Water Resources Commission and Deputy Director of the Department of Natural Resources, to know wherein the real public interest lies. Mr. Purdy readily admits there is nothing wrong or harmful in a commercial vessel discharging an effluent in the open lake which has received the equivalent of secondary waste treatment (Purdy Depo., page 38). At the same time he reiterates that it would be unfortunate from the

standpoint of pollution control if a commercial vessel were to pump out holding tanks containing raw sewage in waters of the Great Lakes other than Michigan waters. (Purdy Depo., pages 43-44). Yet this is exactly what commercial vessels will be compelled to do if they must, as a result of the failure of this Court to stay enforcement of the Michigan Act pending appeal, proceed with the installation of holding tanks.

On the Great Lakes the pollution problems are essentially along the shore. When you collect wastes on board a vessel in a holding tank and bring them ashore, it results in further concentration at a given point. This means that, until such time as treatment devices equivalent to secondary treatment are provided on shore, instead of accelerating pollution abatement from vessels, pollution abatement is actually being delayed because wastes are being brought ashore to a point to provide for treatment that does not exist. (Kinney, page 162). The testimony of Purdy shows that such treatment will not exist until 1974 or later (Purdy, page 12). How can such a program be in the public interest?

Plaintiffs believe that the Congress, in enacting the Water Quality Improvement Act of 1970, was as fully cognizant of the public interest in water pollution abatement as was the Michigan Legislature in enacting the Michigan Watercraft Pollution Control Act. The solution of Congress differs from that of the state of Michigan. Certainly, then, it is in the paramount public interest to resolve the legal issues arising out of these conflicting solutions and that can be done only if the status quo is preserved. Overwhelming considerations of the public interest dictate that this Court order a stay pending appeal.

Conclusion.

Plaintiffs assert that there are many compelling reasons why this Court should preserve the status quo by ordering a stay of enforcement of the Michigan Watercraft Pollution Control Act pending appeal. It is apparent that unless such a stay is ordered, the appeal will be rendered moot. Involved are important issues of constitutional law above and beyond the question of federal preemption, the resolution of which will be in the public interest. Unless such a stay is ordered, not only will plaintiffs' appeal be rendered moot, but they will suffer irreparable harm and injury, whereas the ordering of such stay will result in absolutely no harm or detriment to defendants.

Respectfully submitted,

SCOTT H. ELDER,
JOHN ARTHUR HAMILTON,
Attorneys for Plaintiffs,

By SCOTT H. ELDER.

Of counsel:
JOHNSON, BRANAND & JAEGER.

APPENDIX F.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION.

(Title omitted in printing.)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

I.

Notice is hereby given that the plaintiffs herein, namely, American Steamship Company, Inc., Amersand Steamship Corporation, The Reiss Steamship Company, Gartland Steamship Company, Great Lakes Steamship Division, Bethlehem Steel Corporation, Cleveland-Cliffs Steamship Co., Cleveland Tankers, Inc., Erie Sand Steamship Company, The Hanna Mining Co., Huron Portland Cement Division, National Gypsum Company, Inland Steel Company, The Interlake Steamship Co., Division of Pickands Mather & Co., Kinsman Marine Transit Company, Medusa Portland Cement Company, Columbia Transportation Division, Oglebay Norton Company, Lake Fleet Division, Republic Steel Corporation, Tomlinson Fleet Corporation, Great Lakes Fleet, United States Steel Corporation, Wilson Marine Transit Company, Division of Litton Systems, Inc., hereby appeal to the Supreme Court of the United States from the final order of the District Court of three judges entered in this action on July 12, 1971 dismissing the complaint and dissolving the temporary restraining order.

This appeal was taken pursuant to 28 USCA Sec. 1253.

II.

The clerk will please prepare a transcript of the record in the cause for transmission to the clerk of the Supreme Court of the United States and include in said transcript the following:

1) The complaint for declaratory judgment and injunctive relief.

2) Act 167, Public Acts of 1970, State of Michigan, attached as Exhibit A to the complaint.

3) The affidavit of Vice Admiral Paul E. Trimble, USCG (retired) attached to the complaint.

4) Motion for temporary restraining order and preliminary injunction.

5) Temporary restraining order.

6) Order extending temporary restraining order.

7) Answer to complaint for declaratory judgment and injunctive relief.

8) Stipulation of facts.

9) Transcript of hearing held April 26 and 27, 1971.

10) Deposition of Ralph W. Purdy with attached exhibits.

11) All other exhibits entered in the cause.

12) The court's memorandum opinion entered July 12, 1971.

III.

The following questions are presented by this appeal:

Is Act 167, Public Acts of 1970, State of Michigan, commonly known as the Michigan Watercraft Pollution Control Act of 1970, constitutionally infirm as applied to plaintiffs' federally licensed vessels in that it:

1) Contravenes the essential purposes of and works material injury to characteristic features of the maritime law and interferes with its proper harmony and uniformity,

2) Interferes with federal superintendence of a field where uniformity is necessary and relates to a subject demanding exclusive federal regulation,

3) Places an undue burden on interstate commerce,

4) Denies plaintiffs due process and the equal protection of the laws.

5) Confiicts with existing federal status, namely, the Federal Water Pollution Control Act, as amended by the Water Quality Improvement Act of 1970, which manifests the intent of the federal government to occupy the field exclusively, and the vessel inspection laws which precludes state prescription of shipboard equipment.

6) Is so vague in its language and provisions as to be constitutionally unenforceable.

IV.

The federal statutes, treaties and constitutional provisions involved are: "the Federal Water Pollution Control Act, as amended by the Water Quality Improvement Act of 1970, 33 U.S.C. Sec. 1151, et seq.; the Steamboat Inspection Acts of February 28, 1871 and May 27, 1936, 46 U.S.C. Sec. 361, et seq.; the Boundary Waters Treaty of 1909 between the United States and Canada, 36 Stat. 2448, Treaty Series No. 548; and Article 1 Sec. 8, cl. 3; Article 3 Sec. 2, cl. 1; Article 6, cl. 2; Amendment XIV Sec. 1 of the Constitution of the United States."

SCOTT H. ELDER,
Attorney for Plaintiffs-Appellants.

APPENDIX G.

STATE OF MICHIGAN
ACT 167, PUBLIC ACTS OF 1970.

AN ACT to regulate the disposal of oil and sewage from watercraft; and to prohibit littering of waterways.

The People of the State of Michigan enact:

Sec. 1. This act shall be known and may be cited as the "watercraft pollution control act of 1970."

Sec. 2. As used in this act:

(a) "Act means Act No. 245 of the Public Acts of 1929, as amended, being sections 323.1 to 323.12a of the Compiled Laws of 1948.

(b) "Commission" means the water resources commission of the department of natural resources.

(c) "Litter" means all rubbish, refuse, waste material, garbage, offal, paper, glass, cans, bottles, trash, debris or other foreign substances of every kind and description.

(d) "Sewage" means all human body wastes, treated or untreated.

(e) "Oil" means oil of any kind or in any form, including but not limited to petroleum, fuel oil, sludge and oil refuse.

(f) "Marine toilet" means any toilet on or within a watercraft used to discharge sewage.

(g) "Watercraft" means any contrivance used or capable of being used for navigation upon water, whether or not capable of self-propulsion, including foreign and domestic vessels engaged in commerce upon the waters of this state, passenger or other cargo-carrying vessels and privately owned recreational watercraft.

(h) "Waters of this state" means all of the waterways on which watercraft may be used or operated including,

but not limited to, the Great Lakes and connecting waterways under the jurisdiction of this state.

(i) "Person" means an individual, partnership, firm, corporation, association or other entity.

(j) "Discharge" means any spilling, leaking, pumping, pouring, emitting, emptying or dumping.

Sec. 3. (1) A person shall not place, throw, deposit, discharge or cause to be discharged into or onto the waters of this state, any litter, sewage, oil or other liquid or solid materials which render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes.

(2) It is unlawful to discharge, dump, throw or deposit garbage, litter, sewage or oil from a recreational, domestic or foreign watercraft used for pleasure or for the purpose of carrying passengers, cargo or otherwise engaged in commerce on the waters of this state.

Sec. 4. (1) Any pleasure or recreational watercraft operated on the waters of this state which is moored or registered in another state or jurisdiction, if equipped with a pollution control device approved by that jurisdiction, may be approved by the commission to operate on the waters of this state.

(2) A person owning, operating or otherwise concerned in the operation, navigation or management of a watercraft having a marine toilet shall not own, use or permit the use of such toilet on the waters of this state unless the toilet is equipped with 1 of the following pollution control devices:

(a) A holding tank or self-contained marine toilet which will retain all sewage produced on the watercraft for subsequent disposal at approved dockside or onshore collection and treatment facilities.

(b) An incinerating device which will reduce to ash all sewage produced on the watercraft. The ash shall be disposed of onshore in a manner which will preclude pollution.

Sec. 5. All marinas operating on the bottomlands of the Great Lakes under lease from the department of natural resources under Act No. 247 of the Public Acts of 1955, as amended, being sections 322.701 to 322.715 of the Compiled Laws of 1948 and all those operating on the bottomlands of inland lakes and streams under permit from the department of natural resources under Act No. 291 of the Public Acts of 1965, as amended, being sections 281.731 to 281.752 of the Compiled Laws of 1948 if selling marine fuel or otherwise providing a dockside service center shall provide pump-out facilities approved by the department of public health for marine toilet holding tanks on pleasure watercraft. Failure to comply with the provisions of this section by any marine owner or operator is just cause for revoking the permit or prohibiting the issuance of a lease for the use of the state's bottomlands. The owner or operator of a marina shall be given written notice and opportunity of hearing before any action is taken.

Sec. 5a. All marinas owned and/or operated or leased by the Michigan waterways commission shall by July, 1971 provide pump-out facilities approved by the department of public health for marine toilet holding tanks or pleasure and commercial watercraft.

Sec. 5b. Any marina or dock which is equipped to handle watercraft of the size capable of being equipped with a marine toilet, owned, leased or operated by the state, any of its departments or agencies or any local unit of government shall maintain a pumping station for pumping out the holding tank required on watercraft.

Sec. 5c. Any marina or dock that holds 15 watercraft or less is exempt from section 5 of this act.

Sec. 6. An applicant for a boat place registration for a watercraft pursuant to section 1a of Act No. 70 of the Public Acts of 1911, as amended, being section 207.51a of the Compiled Laws of 1948 shall disclose at such time to the commission whether the watercraft has in or on it a marine toilet, and if so, whether the toilet is equipped with a pollution control device as required by this act. The commission may request the secretary of state to provide it with the name of registrant whose registration indicates the absence of such pollution control device on a marine toilet.

Sec. 7. (1) A person owning, operating or otherwise concerned in the operation, navigation or management of a watercraft operating on the waters of this state shall not discharge or permit the discharge of oil or oily wastes from the watercraft into or onto the waters of this state if the oil or oily wastes threaten to pollute or contribute to the pollution of the waters or adjoining shorelines or beaches.

(2) The owner or operator of any watercraft who, whether directly or through any person concerned in the operation, navigation or management of the watercraft, discharges or permits or causes or contributes to the discharge of oil or oily wastes into or onto the waters of this state or adjoining shorelines or beaches shall immediately remove the oil or oily wastes from the waters, shorelines or beaches. If the state removes the oil or oily wastes which were discharged by an owner or operator, the watercraft and the owner or operator are liable to the state for the full amount of the costs reasonably incurred for its removal. The state may bring action against the owner or operator to recover such costs in any court of competent jurisdiction.

Sec. 8. All watercraft moored, operated or located upon the waters of this state are subject to inspection by the commission, any lawfully designated agent or inspector thereof or any peace, conservation or police officer for the purpose of determining if the watercraft is equipped in compliance with the requirements of this act. The commission may inspect marinas and other waterside facilities used by watercraft for launching, docking or mooring purposes to determine if they are equipped with trash receptacles, sewage disposal equipment or both. Commercial docks and wharfs designed for receiving and loading cargo, and/or freight from commercial watercraft must furnish facilities, if determined necessary, as prescribed by the commission, to accommodate discharge of sewage from heads and galleys, and for deposit of litter, garbage, trash, or bilge waters from the watercraft which utilize the docks or wharfs.

Sec. 9. The state fully reserves to itself the exclusive right to establish requirements with reference to the disposal or discharge of sewage, litter and oil from all watercraft. In order to assure statewide uniformity, the regulation by any political subdivision of the state of waste disposal from watercraft is prohibited.

Sec. 10. The commission may promulgate all rules necessary or convenient for the carrying out of duties and powers conferred by this act.

Sec. 11. Any person who violates any provision of this act is guilty of a misdemeanor and shall be fined not more than $500.00. To be enforceable, the provision or the rule shall be of such flexibility that a watercraft owner, in carrying out the provision or rule, is able to maintain maritime safety requirements and comply with the federal marine and navigation laws and regulations.

Sec. 12. This act shall take effect January 1, 1971.

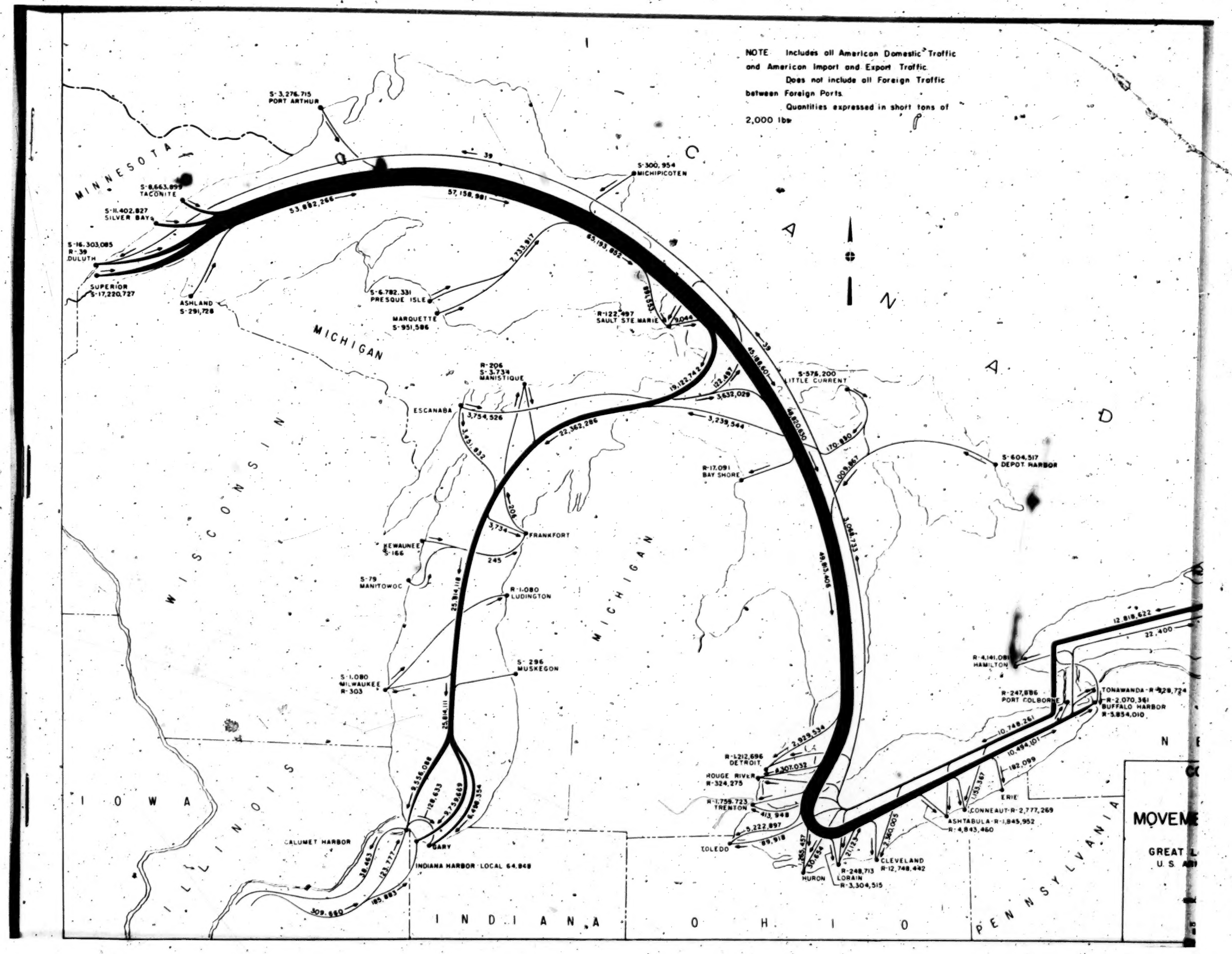
This act is ordered to take immediate effect.

APPENDIX H.

Series of Charts Containing Commercial Statistics for Bulk Movements on the Great Lakes, Prepared by Great Lakes Regional Statistical Office, U. S. Army Engineer, Division, North Central Corps of Engineers.

(Attached.)

NOTE Includes all American Domestic Traffic and American Import and Export Traffic.
Does not include all Foreign Traffic between Foreign Ports.
Quantities expressed in short tons of 2,000 lbs



NOTE Includes all American Domestic Traffic and American Import and Export Traffic.

Does not include all Foreign Traffic between Foreign Ports.

Quantities expressed in short tons of 2,000 lbs.

S-276,715
PORT ARTHUR

39

S-300,954
NICHIPICOTEN

53,882,266

57,158,981

65,193,882

7,733,817

S-6,782,331
PRESQUE ISLE

MARQUETTE
S-951,586

881,553

R-122,497
SAULT STE MARIE

9,044

MICHIGAN

R-206
S-3,734
MANISTIQUE

19,122,742

122,497

3,632,029

45,188,501

39

S-576,200
LITTLE CURRENT

ESCANABA

3,754,526

3,239,544

22,362,286

543,832

48,820,630

170,830

1,009,867

S-604,517
DEPOT HARBOR

R-17,091
BAY SHORE

206

3,734

FRANKFORT

KEWAUNEE
S-166

245

S-79
MANITOWOC

25,814,118

R-1,080
LUDINGTON

48,813,406

3,068,733

MICHIGAN

PICTON

604,330

12,818,622

22,400

12,214,292

22,400

R-4,141,081
HAMILTON

S-1,080
MILWAUKEE
R-303

S-295
MUSKEGON

26,814,111

R-247,686
PORT COLBORNE

TONAWANDA-R-228,724
R-2,070,361
BUFFALO HARBOR
R-5,854,010

10,748,261

10,494,101

182,099

N E W Y O R K

2,929,534

R-1,212,696
DETROIT

4,307,032

ROUGE RIVER
R-324,275

1,153,367

ERIE

R-1,759,723
TRENTON

413,948

CONNEAUT-R-2,777,269

ASHTABULA-R-1,845,952
R-4,843,460

9,556,088

128,633

9,739,869

6,498,354

5,222,897

89,918

2,360,005

1,265,657

30,854

21,123

R-248,713
LORAIN
R-3,304,515

CLEVELAND
R-12,748,442

HURON

TOLEDO

CALUMET HARBOR

38,483

123,777

INDIANA HARBOR-LOCAL 64,868

309,660

185,883

PENNSYLVANIA

I N D I A N A

O H I O

COMMERCIAL STATISTICS

1964 IRON ORE MOVEMENTS ON THE GREAT LAKES

PREPARED BY
GREAT LAKES REGIONAL STATISTICAL OFFICE
U. S. ARMY ENGINEER, DIVISION, NORTH CENTRAL
CORPS OF ENGINEERS

Under the direction of
BRIGADIER GENERAL ROY T DODGE, DIVISION ENGINEER

SCALE OF MILES
50 0 50 100

NOTE Includes all American Domestic Traffic and American Import and Export Traffic.

Does not include all Foreign Traffic between Foreign Ports.

Quantities expressed in short tons of 2,000 lbs.

HARBORS NOT INCLUDED IN G
BAYFIELD HARBORS, WISCONS
BELLE ISLE HARBOR, MICHIG
CATAWBA ISLAND, OHIO
CHARLEVOIX, MICHIGAN
DETROIT HARBOR, WISCONS
GILLS ROCK, WISCONSIN
GRAND PORTAGE HARBOR, MINNES
GREEN BAY HARBOR, WISCONSI
HOUGHTON, MICHIGAN
KELLEYS ISLAND, OHIO
LA POINTE HARBOR, WISCON
LELAND HARBOR, MICH
MARBLEHEAD, OHIO
MIDDLE BASS ISLAND, O
NORTH BASS ISLAND, O
NORTH MANITOU ISLAND, MIC
PORT CLINTON, OHIO
PUT-IN-BAY, OHIO
ROCK HARBOR, MICHI
SANDUSKY HARBOR, OH
ST JAMES(BEAVER ISLAND), MIC
SISKIWIT BAY HARBOR, MIC
SOUTH MANITOU ISLAND, MICH
STURGEON BAY, WISCONS
WASHINGTON HARBOR, MICH

MINNESOTA

R-15,781 TACONITE

SUPERIOR R-95,611 S-92,256

ONTONAGON R-16,181

DOLLAR BAY R-30,068

PRESQUE ISLE

MARQUETTE R-44,369

MICHIGAN

R-221,453 GLADSTONE

R-189,856 WELLS

ESCANABA R-183,284

R-28. MENOMINEE

R-209,438 GREEN BAY

KEWAUNEE

TWO RIVERS R-37,769

MANITOWOC

R-171,179 SHEBOYGAN

PORT WASHINGTON

MILWAUKEE

R-54,852 RACINE

LOCAL & INTRAPORT 447,603

CHICAGO HARBOR

CALUMET HARBOR

GARY—129,412

INDIANA HARBOR—LOCAL-11,666

R-166,363 ST. JOSEPH & BENTON HARBOR

FRANKFORT

LUDINGTON

MUSKEGON

GRAND HAVEN & FERRYSBURG

CHARLEVOIX R-24,865

R-115,502 TRAVERSE CITY

MACKINAW CITY R-24,218

CHEBOYGAN R-19,141

ST. IGNACE

SAULT STE. MARIE R-10,340

SAULT STE. MARIE R-52,078

LIME ISLAND R-103,378

R-2,370 DRUMMOND ISLAND

R-13,469 ALPENA

R-96,518 HARRISVILLE

BANGOR

S-25 BAY CITY

SARNIA PORT HURON

40,918 LOCAL & INTRAPORT DETROIT WINDSOR

S-114,027 ROUGE RIVER

ECORSE

TRENTON S-37,861 R-28,849

TOLEDO LOCAL-1,006

R-21,738 CLEVELAND LOCAL-22,135

R-6,547 PORT STANLEY

ASHTABULA

ERIE R-56,075

R-7,534 OSHAWA

R-35,946 TORONTO

R-2,638 CLARKSON S-3,377

HAMILTON R-39,792

LOCAL & INTRAPORT 31,554

BUFFALO HARBOR S-113,146

IOWA

ILLINOIS

WISCONSIN

INDIANA

OHIO

PENNSYLVANIA

CANADA

NOTE Includes all American Domestic Traffic and American Import and Export Traffic.

Does not include all Foreign Traffic between Foreign Ports.

Quantities expressed in short tons of 2,000 lbs.

HARBORS NOT INCLUDED IN FLOW	RECEIPTS	SHIPMENTS
BAYFIELD HARBORS, WISCONSIN	—	353
BELLE ISLE HARBOR, MICHIGAN	7	—
CATAWBA ISLAND, OHIO	—	1,015
CHARLEVOIX, MICHIGAN	26	331
DETROIT HARBOR, WISCONSIN	1,877	—
GILLS ROCK, WISCONSIN	—	25
GRAND PORTAGE HARBOR, MINNESOTA	—	56
GREEN BAY HARBOR, WISCONSIN	—	4,117
HOUGHTON, MICHIGAN	—	160
KELLEYS ISLAND, OHIO	984	—
LA POINTE HARBOR, WISCONSIN	353	—
LELAND HARBOR, MICHIGAN	—	94
MARBLEHEAD, OHIO	—	4
MIDDLE BASS ISLAND, OHIO	293	—
NORTH BASS ISLAND, OHIO	109	—
NORTH MANITOU ISLAND, MICHIGAN	51	—
PORT CLINTON, OHIO	—	405
PUT-IN-BAY, OHIO	1,131	4
ROCK HARBOR, MICHIGAN	145	—
SANDUSKY HARBOR, OHIO	—	1,089
ST JAMES (BEAVER ISLAND), MICHIGAN	331	26
SISKIWIT BAY HARBOR, MICHIGAN	13	—
SOUTH MANITOU ISLAND, MICHIGAN	33	—
STURGEON BAY, WISCONSIN	2,265	—
WASHINGTON HARBOR, MICHIGAN	51	—
TOTAL	7,679	7,679

COMMERCIAL STATISTICS

1964 PETROLEUM PRODUCTS MOVEMENTS ON THE GREAT LAKES

INCLUDING GASOLINE, FUEL OILS, CRUDE OIL, JET FUELS, KEROSENE, ALIPHATIC NAPHTHA LUBRICATING OILS, AND PETROLEUM PRODUCTS, N.E.C.

PREPARED BY

GREAT LAKES REGIONAL STATISTICAL OFFICE
U.S. ARMY ENGINEER, DIVISION, NORTH CENTRAL
CORPS OF ENGINEERS

Under the direction of
BRIGADIER GENERAL ROY T. DODGE, DIVISION ENGINEER

SCALE OF MILES
10 0 50 100

MICHIGAN
ONTARIO
NEW YORK
INDIANA
OHIO
PENNSYLVANIA
DOLLAR BAY R-30,068
PRESQUE ISLE
MARQUETTE R-44,369
R-10,340 SAULT STE. MARIE
SAULT STE. MARIE R-52,078
LIME ISLAND R-103,378
R-2,370 DRUMMOND ISLAND
R-221,453 GLADSTONE
R-189,856 WELLS
ESCANABA R-183,284
ST. IGNACE 6,219
MACKINAW CITY R-24,218
CHEBOYGAN R-19,141
CHARLEVOIX R-24,865
R-115,502 TRAVERSE CITY
R-13,469 ALPENA
R-96,518 HARRISVILLE
R-28 MENOMINEE
R-209,438 GREEN BAY
FRANKFORT
KEWAUNEE 91,256
TWO RIVERS R-37,769
MANITOWOC
LUDINGTON
R-171,179 SHEBOYGAN
PORT WASHINGTON 57,743
MILWAUKEE
MUSKEGON
GRAND HAVEN & FERRYSBURG
R-54,852 RACINE
R-166,363 ST. JOSEPH & BENTON HARBOR
LOCAL & INTRAPORT 447,603
CHICAGO HARBOR
CALUMET HARBOR
GARY — 129,412
INDIANA HARBOR — LOCAL 11,666
BANGOR
S-25 BAY CITY
SARNIA PORT HURON
40,918 LOCAL & INTRAPORT DETROIT WINDSOR
S-14,027 ROUGE RIVER
ECORSE
TRENTON S-37,861 R-28,849
TOLEDO LOCAL 1,006
R-6,547 PORT STANLEY
R-21,738 CLEVELAND LOCAL 22,135
ASHTABULA
ERIE R-56,075
R-7,534 OSHAWA
R-35,946 TORONTO
R-2,638 CLARKSON S-3,377
HAMILTON R-39,792
LOCAL & INTRAPORT 31,554
BUFFALO HARBOR S-113,146
MASSENA 69,350
OGDENSBURG
R-53,615 SACKETS HARBOR
OSWEGO
127,573
157,641
256
63,575
321,143
183,502
28,681
119,133
63,575
24,122
120,615
67,634
484,232
50,7
73,735
78,752
136,827
770,328
9,353
39,239
43,512
1,505,188
209,466
1,100
28
227
21,348
91,256
873
970
542
37
302
1,805
3,107
80,443
150,686
664,533
254,456
39,801
34,906
1,020
554,106
5,903
418,275
41,048
3,336
33,910
208,865
817,811
2,188,345
45,684
156,590
69,471
94,718
665,495
11,180
41,482
210,741
61,111
61,086
173,279
344,529
5,399
42,876
21,983
14,583
133
6,198
2,247,504
103,734
1,052
8,108
116,512
3
11,679
237,675
9,161
23,167
164,369
151,181
24,119
172,919
820,917
2,211
134,074
237
89,161
479,775
1,550
81,689
71,921
1,044
45,955
325,273
219,445
44,933
173,355
80,622
20,316
26,638
280,615
283,209
2,594
198,545
46,090
13,653
193,864
23,815
95,703
51,108
15,148
287,029

NOTE- Includes all American Domestic Traffic and American Import and Export Traffic

Does not include all Foreign Traffic between Foreign Ports.

Quantities expressed in short tons of 2,000 lbs.

HARBORS NOT INCLUDED IN FLOW	RECEIPTS
DETROIT HARBOR, WISCONSIN	39
GREEN BAY HARBOR, WISCONSIN	—
KELLEYS ISLAND, OHIO	294
MIDDLE BASS ISLAND, OHIO	41
NORTH BASS ISLAND, OHIO	43
PORT CLINTON, OHIO	—
PUT-IN-BAY, OHIO	117
SANDUSKY HARBOR, OHIO	—
STURGEON BAY, WISCONSIN	6
TOTAL	540

R-4,238 PORT ARTHUR
FORT WILLIAM R-97,791
R-60,741 HERON BAY
MICHIPICOTEN R-21,711
R-445,831 TACONITE
SILVER BAY R-252,927
R-1,581,348 DULUTH
SUPERIOR R-1,485,406
WASHBURN I/C R-68,870
ASHLAND R-230,538
HOUGHTON R-6,915
HANCOCK
LAKE LINDEN R-155,760
DOLLAR BAY R-245,980
MARQUETTE R-394,291
MUNISING R-36,319
R-2,294,404 SAULT STE. MARIE
SAULT STE. MARIE R-49,687
R-112,049 LIME ISLAND
R-289,815 DETOUR
R-1,745 MACKINAC HBR.
R-433,026 LITTLE CURRENT
R-5,965 PARRY SOUND
R-10,966 GLADSTONE
R-9,223 MANISTIQUE
R-313,512 ESCANABA
R-12,905 CHEBOYGAN
PETOSKEY R-149,605
ADVANCE R-15,357
BOYNE CITY R-4,490
R-58,893 TRAVERSE CITY
CALCITE R-67,547
R-482,513 BAY SHORE
ALPENA R-112,422
MENOMINEE
MARINETTE R-27,787
R-1,260,885 GREEN BAY
DE PERE R-18,439
KEWAUNEE
R-35,567 TWO RIVERS
R-42,185 MANITOWOC
SHEBOYGAN
PORT WASHINGTON
R-297,876 MILWAUKEE
R-2,448,655 OAK CREEK
RACINE
R-110,277 WAUKEGAN
INTRAPORT 3,788 CHICAGO HARBOR
S-6,601,504 CALUMET HARBOR
INDIANA HARBOR
6,528,646
STURGEON BAY
FRANKFORT
MANISTEE R-83,057
FICER CITY R-135,983
LUDINGTON
MUSKEGON
GRAND HAVEN & FERRYSBURG R-65,475
HOLLAND
SOUTH HAVEN
ST JOSEPH & BENTON HARBOR R-3,335
OWEN SOUND R-15,669
COLLINGWOOD R-4,953
R-5,785 PORT McNICOLL
R-70,935 MIDLAND
R-29,193 BELLEVILLE
R-17,967 TRENTON
PICTON
R-5,954 PORT HOPE
COBOURG
R-34,937 OSHAWA
R-486,923 TORONTO
R-413,475 PORT CREDIT
R-3,049,320 HAMILTON
R-19,746 PORT WELLER
R-211,309 THOROLD
R-6,955 WELLAND
R-214,673 PORT COLBORNE
PORT MAITLAND R-10,311
R-1,950,020 BUFFALO HARBOR
R-13,357 GODERICH
HARBOR BEACH
R-29,597 BANGOR
ESSEXVILLE
R-12,065 ZILWAUKEE
BAY CITY R-7,948
SAGINAW R-54,958
R-102,616 PORT HURON
R-267,673 MARYSVILLE
R-3,568,509 ST CLAIR
MARINE CITY R-3,009
PORT OF SARNIA R-788,810
R-147,468 PORT STANLEY
R-335,626 PORT BURWELL
R-4,726,247 DETROIT
R-5,400,995 ROUGE RIVER
R-37,300 ECORSE
WYANDOTTE R-1,181,802
TRENTON R-743,230
MONROE R-28,522
TOLEDO LOCAL-4,858
SANDUSKY S-255,019
HURON S-2,371
LORAIN S-2,052,085
CLEVELAND S-4,812
FAIRPORT S-1,343,425
ASHTABULA S-3,018,800
CONNEAUT S-382,717
S-83,631 ERIE
R-33,713 ERIEAU
KINGSVILLE R-32,223
PORT OF WINDSOR
4,064,920
4,653,345
5,105,666
7,243,285
4,891,367
299,408
17,000
14,733
9,513
203
279,705
46,609
5,018
536,333
13,333,467
2,249,855
2,145,287
214,687
31,687
58,730
97,059
13,953
6,845
3,067
204,710
108,837
6,169
895,234
886,697
57,698
184,671
720,242
877,355
2,758,298
1,234,966
2,488,022
256,280
38,680
51,004
44,991
508,720
12,277
31,997
205
35,275
12,009
2,007
3,219
6,450
82,217
55,889
65,905
111,607
145,052
330,810
304,661
211,418
117,183
9,181
9,744
1,142,631
18,927
48,495
27,360
1,174,780
9,827
1,099,597
803
6,103,117
3,310,960
4,113
5,569
COMMERCE
MOVEMENT
GREAT LAKE
U.S. ARMY
BRIGADIER

NOTE Includes all American Domestic Traffic and American Import and Export Traffic

Does not include all Foreign Traffic between Foreign Ports.

Quantities expressed in short tons of 2,000 lbs.

HARBORS NOT INCLUDED IN FLOW	RECEIPTS	SHIPMENTS
DETROIT HARBOR, MICHIGAN	39	—
GREEN BAY HARBOR, WISCONSIN	—	21
KELLEYS ISLAND, OHIO	294	—
MIDDLE BASS ISLAND, OHIO	41	—
NORTH BASS ISLAND, OHIO	43	—
PORT CLINTON, OHIO	—	148
PUT-IN-BAY, OHIO	117	—
SANDUSKY HARBOR, OHIO	—	347
STURGEON BAY, WISCONSIN	6	24
TOTAL	540	540

COMMERCIAL STATISTICS
1964 COAL MOVEMENTS ON THE GREAT LAKES
(ANTHRACITE AND BITUMINOUS)

PREPARED BY

GREAT LAKES REGIONAL STATISTICAL OFFICE
U. S ARMY ENGINEER, DIVISION, NORTH CENTRAL
CORPS OF ENGINEERS

Under the direction of
BRIGADIER GENERAL ROY Y. DODGE, DIVISION ENGINEER

SCALE OF MILES

NOTE Includes all American Domestic Traffic and American Import and Export Traffic.

Does not include all Foreign Traffic between Foreign Ports.

Quantities expressed in short tons of 2,000 lbs.

PORT ARTHUR
FORT WILLIAM
6,284
6,901
13,185
1,615,326
MINNESOTA
1,602,141
15,051
784,903
DULUTH
817,238
SUPERIOR
MICHIGAN
15,051
1,615,326
260,331
275,382
17,340
1,873,657
GREEN BAY
325
275,057
35
6,873
FRANKFORT
KEWAUNEE
6,838
17,340
MANITOWOC
5,573
5,573
LUDINGTON
650
5,572
MUSKEGON
MILWAUKEE
8,625
KENOSHA
480
75,032
191,142
17,340
43,052
LOCAL & INTRAPORT
CHICAGO HARBOR
1,260
125,148
49,742
CALUMET HARBOR
MICHIGAN CITY
S-51,002
57,026
172,191
297,339
142,327
199,553
WISCONSIN
ILLINOIS
IOWA
INDIANA
OHIO
CARROLLTON
17,340
71,148
1,946,805
884,839
12,852
1,050
2,400
R-12,852
PORT COLBORNE
BUFFALO HARBOR
R-1,328,696
7,606
R-60,294
DETROIT
R-3,503
1,886,511
2,213,535
7,606
4,103
TOLEDO
S-377,961
HURON
S-12,098
CLEVELAND
R-63,035
PENNSYLVANIA
CANADA
MOVEMEN
GREAT LAK
U S ARMY

NOTE Includes all American Domestic Traffic and American Import and Export Traffic.
Does not include all Foreign Traffic between Foreign Ports.
Quantities expressed in short tons of 2,000 lbs.

T ARTHUR
WILLIAM
6,284
6,901
13,185
1,615,326
15,051
1,615,326
MICHIGAN
15,051
260,331
275,382
17,340
1,875,657
275,057
GREEN BAY
325
35
KEWAUNEE
6,838
MANITOWOC
5,573
6,873
FRANKFORT
17,340
5,573
LUDINGTON
650
5,572
MUSKEGON
MILWAUKEE
8,625
KENOSHA
480
75,032
197,142
17,340
43,052
LOCAL & INTRAPORT
CHICAGO HARBOR
1,260
125,148
CALUMET HARBOR
49,142
MICHIGAN CITY
S-51,002
57,026
142,527
199,553
MICHIGAN
17,340
71,148
CARROLLTON
1,946,805
R-60,294
DETROIT
R-3,503
1,886,511
TOLEDO
S-377,961
HURON
S-12,098
CLEVELAND
R-63,035
4,103
2,213,535
7,606
A
D
A
884,839
884,839
OSWEGO
R-4,140
12,852
1,050
2,400
1,050
2,400
R-12,852
PORT COLBORNE
BUFFALO HARBOR
R-1,328,696
7,606
N E W Y O R K
PENNSYLVANIA
I N D I A N A
O H I O

COMMERCIAL STATISTICS

1964 WHEAT MOVEMENTS ON THE GREAT LAKES

PREPARED BY
GREAT LAKES REGIONAL STATISTICAL OFFICE
U.S. ARMY ENGINEER, DIVISION, NORTH CENTRAL
CORPS OF ENGINEERS

Under the direction of
BRIGADIER GENERAL ROY T DODGE, DIVISION ENGINEER

SCALE OF MILES
100 0 50 100

NOTE: Includes all American Domestic Traffic and American Import and Export Traffic.

Does not include all Foreign Traffic between Foreign Ports.

Quantities expressed in short tons of 2,000 lbs.

HARBORS NOT INCLUDED IN FLOW	RECEIPTS	SHIPMENTS
KELLEYS ISLAND, OHIO	69	—
MARBLEHEAD, OHIO	—	750
MIDDLE BASS ISLAND, OHIO	500	—
NORTH BASS ISLAND, OHIO	250	—
SANDUSKY, OHIO	—	69
TOTAL	819	819

R-2,240 PORT ARTHUR
R-18,920 FORT WILLIAM
R-12,497 HERON BAY
MINNESOTA
949,017
974,677
987,174
928,077
R-542,812 DULUTH
SUPERIOR R-385,265
LAKE LINDEN R-4,500
ASHLAND R-20,940
MICHIGAN
R-601,347 SAULT STE. MARIE
SAULT STE. MARIE R-7,521
S-1,443,162 PORT DOLOMITE
PORT INLAND S-2,682,668
2,193,234
2,002,709
110,279
1,438,845
ST. IGNACE 465
DRUMMOND IS. 1,799,877
3,830,308
5,673,808
585,857
GLADSTONE R-8,435
R-19,171 CHEBOYGAN
488,395
S-7,447,517 CALCITE
STONEPORT R-307,865
3,601,013
BAY SHORE
9,003
4,000
414,692
19,883
ALPENA
17,283
R-5,094 PARRY SOUND
R-171 CHARLEVOIX
BOYNE CITY R-4,259
R-51,256 MENOMINEE
TRAVERSE CITY R-8,224
R-151,805 GREEN BAY
9,880,784
477
PORT GYPSUM S-95,814
181,144
233,442
ALABASTER S-273,572
R-18,334 MANISTEE
R-348,410 MANITOWOC
LUDINGTON R-664,609
SHEBOYGAN R-1,512
WISCONSIN
MICHIGAN
1,682,797
4,782,252
106
R-251,823 BANGOR
ESSEXVILLE — R-629,488
R-45,930 ZILWAUKEE
BAY CITY — R-111,135
R-168,888 CARROLLTON
SAGINAW R-475,533
340,441
125,113
R-131,336 MUSKEGON S-96
S-469 MILWAUKEE R-319,560
GRAND HAVEN & FERRYSBURG R-59,900
HOLLAND R-68,713
R-24,113 PORT OF SARNIA
PORT HURON R-36,867 — MARYSVILLE
R-9,561 — ST CLAIR
R-70,289 — MARINE CITY
R-3,644 — ALGONAC
R-10,853 PORT COLBORNE
106
8,419
R-40,051 TONAWANDA
BUFFALO HARBOR R-2,659,007
DUNKIRK R-2,966
R-172,141 WAUKEGAN
R-16,956 SOUTH HAVEN
ST JOSEPH & BENTON HARBOR R-87,122
LOCAL & INTRAPORT 591,250
CHICAGO HARBOR
1,634,096
93,726
15,009
69,825
DETROIT PORT OF WINDSOR
R-1,847,955 — ROUGE RIVER
R-33,791 — ECORSE
WYANDOTTE R-2,175,394
TRENTON R-9,441
106
2,721,296
R-164,359 ERIE
CONNEAUT R-741,721
ASHTABULA R-788,192
IOWA
ILLINOIS
9,257
CALUMET HARBOR R-2,275,019
GARY — R-2,075,945
BUFFINGTON — R-1,189,635
INDIANA HARBOR R-2,251,594
310,126
634,111
MARBLEHEAD
118,388
FAIRPORT R-1,368,118
CLEVELAND S-160 R-2,069,939
LORAIN R-682,893
INDIANA
OHIO
PENNSYLVANIA
NE
CO
MOVEME
GREAT LA
U.S. ARM

NOTE Includes all American Domestic Traffic and American Import and Export Traffic.

Does not include all Foreign Traffic between Foreign Ports.

Quantities expressed in short tons of 2,000 lbs.

HARBORS NOT INCLUDED IN FLOW	RECEIPTS	SHIPMENTS
KELLEYS ISLAND, OHIO	69	—
MARBLEHEAD, OHIO	—	750
MIDDLE BASS ISLAND, OHIO	500	—
NORTH BASS ISLAND, OHIO	250	—
SANDUSKY, OHIO	—	69
TOTAL	819	819

R-12,497 HERON BAY

949,017

974,677

987,174

LAKE LINDEN R-4,500

R-601,347 SAULT STE. MARIE

SAULT STE. MARIE R-7,521

MICHIGAN

PORT INLAND S-2,682,668

2,183,234

S-1,443,162 PORT DOLOMITE

2,002,709

ST. IGNACE 463

GLADSTONE R-8,435

1,438,545

110,279

42,738

DRUMMOND IS.

1,798,977

5,630,309

5,673,808

389,857

R-19,171 CHEBOYGAN

488,395

S-7,447,517 CALCITE

STONEPORT R-307,865

3,601,013

BAY SHORE

ALPENA

9003

4,000

19,883

17,283

414,692

R-5,094 PARRY SOUND

R-51,256 MENOMINEE

R-171 CHARLEVOIX

BOYNE CITY R-4,259

9,880,798

477

R-151,805 GREEN BAY

TRAVERSE CITY R-8,224

PORT GYPSUM S-95,814

181,144

233,442

R-18,334 MANISTEE

R-348,410 MANITOWOC

ALABASTER S-273,572

LUDINGTON R-664,609

14,782,252

1,682,797

106

SHEBOYGAN R-1,512

R-251,823 BANGOR

ESSEXVILLE — R-629,488

R-45,930 ZILWAUKEE

BAY CITY — R-111,135

R-168,888 CARROLLTON

SAGINAW R-475,533

340,441

R-131,336 MUSKEGON

S-96

S-469 MILWAUKEE R-319,560

R-24,113 PORT OF SARNIA

124,113

PORT HURON

R-36,867 MARYSVILLE

R-9,561 ST. CLAIR

R-70,289 MARINE CITY

R-3,644 ALGONAC

GRAND HAVEN & FERRYSBURG R-59,900

HOLLAND R-68,713

R-10,853 PORT COLBORNE

R-40,051 TONAWANDA

BUFFALO HARBOR R-2,659,007

DUNKIRK R-2,966

106

8,419

1,634,096

93,726

15,009

69,825

R-172,141 WAUKEGAN

R-16,956 SOUTH HAVEN

DETROIT

PORT OF WINDSOR

R-1,847,955 — ROUGE RIVER

R-33,791 — ECORSE

WYANDOTTE R-2,175,394

TRENTON R-9,441

2,721,296

R-164,359 ERIE

CONNEAUT R-741,721

ASHTABULA R-788,192

LOCAL & INTRAPORT 591,250

CHICAGO HARBOR

925

310,126

634,111

FAIRPORT R-1,368,118

CLEVELAND S-160 R-2,069,939

CALUMET HARBOR R-2,275,019

GARY — R-2,075,945

BUFFINGTON — R-1,189,635

INDIANA HARBOR R-2,251,594

MARBLEHEAD

118,388

LORAIN R-682,893

ST JOSEPH & BENTON HARBOR R-87,122

INDIANA

OHIO

PENNSYLVANIA

NEW YORK

CANADA

COMMERCIAL STATISTICS

1964 STONE MOVEMENTS ON THE GREAT LAKES

PREPARED BY

GREAT LAKES REGIONAL STATISTICAL OFFICE

U. S. ARMY ENGINEER, DIVISION, NORTH CENTRAL CORPS OF ENGINEERS

Under the direction of

BRIGADIER GENERAL ROY T. DODGE, DIVISION ENGINEER

SCALE OF MILES

10 0 50 100

NOTE: Includes all American Domestic Traffic and American Import and Export Traffic.

Does not include all Foreign Traffic between Foreign Ports.

Quantities expressed in short tons of 2,000 lbs.

MINNESOTA

DULUTH

SUPERIOR

612,619

472,755

890,374

MICHIGAN

WISCONSIN

ILLINOIS

IOWA

INDIANA

OHIO

PENNSYLVANIA

CANADA

2,137,490

3,027,864

3,024,988

2,876

2,876

COLLINGWOOD

279

FRANKFORT

90

KEWAUNEE

189

MANITOWOC

87

87

57

57

LUDINGTON

29,260

25,369

MUSKEGON

MILWAUKEE

332,970

1,859,149

149,739

170,390

INTRAPORT-107,164

CHICAGO HARBOR

142,568

CALUMET HARBOR

378,179

235,613

85,636

71,484

14,152

13,656

GODERICH

5,925

CARROLLTON

3,037,277

R-29,954

TORONTO

3,382,342

R-302,13

BUFFALO HARBOR

PORT OF WINDSOR

5,022

3,714,430

692,175

TOLEDO

MOVEM

GREAT L

U.S A

NOTE Includes all American Domestic Traffic and American Import and Export Traffic.
Does not include all Foreign Traffic between Foreign Ports.
Quantities expressed in short tons of 2,000 lbs.

CANADA

MICHIGAN

950,374

2,137,490

890,374

3,027,864

2,876

3,024,988

2,876

COLLINGWOOD

R-77,764
CARDINAL

R-61,815
PRESCOTT

3,218,478

R-21,596
KINGSTON

3,356,058

R-29,954
TORONTO

3,382,342

2,688

OSWEGO

3,528

13,838

GODERICH

3,027,277

25,935

CARROLLTON

279

FRANKFORT

90

KEWAUNEE

189

MANITOWOC

87

87

LUDINGTON

57

57

29,260

25,369

MUSKEGON

MILWAUKEE

332,970

1,859,149

INTRAPORT-107,164
CHICAGO HARBOR

149,238

1,708,390

142,548

235,613

71,484

14,152

PORT OF WINDSOR

5,032

692,175

TOLEDO

3,714,430

R-302,134
BUFFALO HARBOR

NEW YORK

INDIANA

OHIO

PENNSYLVANIA

COMMERCIAL STATISTICS

1964 CORN MOVEMENTS ON THE GREAT LAKES

PREPARED BY
GREAT LAKES REGIONAL STATISTICAL OFFICE
U. S. ARMY ENGINEER, DIVISION, NORTH CENTRAL
CORPS OF ENGINEERS

Under the direction of
BRIGADIER GENERAL ROY T. DODGE, DIVISION ENGINEER

SCALE OF MILES
100 0 50 100

NOTE " Includes all American Domestic Traffic and American Import and Export Traffic.
Does not include all Foreign Traffic between Foreign Ports.
Quantities expressed in short tons of 2,000 lbs.

PORT ARTHUR
FORT WILLIAM
13,004
25,233
190,417
225,650
8,442
946,743
MINNESOTA
3,193
586,500
DULUTH
360,243
19,104
22,297
SUPERIOR
1,172,393
831
MICHIGAN
195,149
234,944
59,795
12,715
12,715
97,244
60,646
989,929
WISCONSIN
306
16
FRANKFORT
KEWAUNEE
1,272
14,897
8,891
MANITOWOC
966
8,891
180
LUDINGTON
10,725
25,195
MUSKEGON
MILWAUKEE
197,903
48,629
42,349
3,306
38,834
CHICAGO HARBOR
4,035
CALUMET HARBOR
3,494
814
838
4,849
4,332
IOWA
ILLINOIS
INDIANA
OHIO
PENNSYLVANIA
822,888
63,082
R-2,436
BUFFALO HARBOR
156,999
SARNIA
S-9862
R-19,934
DETROIT
979,887
60,646
NEW
GC
19
MOVEME
GREAT L
U.S. A

NOTE Includes all American Domestic Traffic and American Import and Export Traffic.
Does not include all Foreign Traffic between Foreign Ports.
Quantities expressed in short tons of 2,000 lbs.

C A N A D A

MICHIGAN

MICHIGAN

I N D I A N A

O H I O

P E N N S Y L V A N I A

N E W Y O R K

ARTHUR
WILLIAM
13,004
35,233
190,417
225,650
8,442
946,743
22,297
1,172,393
831
195,149
254,944
59,795
12,715
12,715
977,244
60,646
989,959
306
KEWAUNEE
16
FRANKFORT
7,272
14,897
MANITOWOC
966
8,891
8,891
LUDINGTON
180
10,725
MILWAUKEE
197,903
48,629
25,195
MUSKEGON
42,340
3,506
38,934
CHICAGO HARBOR
4,035
CALUMET HARBOR
3,494
814
838
798,157
63,082
822,888
63,082
OSWEGO
R-24,731
R-2,436
BUFFALO HARBOR
156,999
SARNIA
S-9,862
R-49,934
DETROIT
979,887
60,646

COMMERCIAL STATISTICS

1964 BARLEY AND RYE MOVEMENTS ON THE GREAT LAKES

PREPARED BY
GREAT LAKES REGIONAL STATISTICAL OFFICE
U. S. ARMY ENGINEER, DIVISION, NORTH CENTRAL
CORPS OF ENGINEERS

Under the direction of
BRIGADIER GENERAL ROY T. DODGE, DIVISION ENGINEER

SCALE OF MILES
0 50 100

NOTE Includes all American Domestic Traffic and American Import and Export Traffic

Does not include all Foreign Traffic between Foreign Ports.

Quantities expressed in short tons of 2,000 lbs.

MINNESOTA

129,745

72,649

DULUTH

57,096

SUPERIOR

MICHIGAN

129,745

8,056

137,801

8,056

KEWAUNEE

40

40

FRANKFORT

8,056

4,600

LUDINGTON

12,656

4,782

MUSKEGON

MILWAUKEE

9,382

8,056

INTRAPORT - 2,117
CHICAGO HARBOR

CALUMET HARBOR

2,656

6,581

3,587

20,665

18,007

10,168

137,801

59,846

R-77,955
BUFFALO HARBOR

WISCONSIN

ILLINOIS

IOWA

INDIANA

OHIO

PENNSYLVANIA

MICHIGAN

A

N

C

A

D

N E

CO

MOVEME

GREAT LA
U.S ARM

NOTE Includes all American Domestic Traffic and American Import and Export Traffic

Does not include all Foreign Traffic between Foreign Ports

Quantities expressed in short tons of 2,000 lbs

C A N A D A

MICHIGAN

MICHIGAN

L A K E

S

I N D I A N A

O H I O

P E N N S Y L V A N I A

N E W Y O R K

129,745

128,745

8,056

8,056

137,801

40

40

FRANKFORT

KEWAUNEE

8,056

4,600

LUDINGTON

12,656

4,782

MUSKEGON

MILWAUKEE

9,382

8,056

INTRAPORT - 2,117
CHICAGO HARBOR

2,858

CALUMET HARBOR

6,581

3,567

18,007

10,168

137,801

S-45
PRESCOTT

59,846

OGDENSBURG
R-45

59,846

R-77,955
BUFFALO HARBOR

COMMERCIAL STATISTICS

1964 OATS MOVEMENTS ON THE GREAT LAKES

PREPARED BY

GREAT LAKES REGIONAL STATISTICAL OFFICE
U. S ARMY ENGINEER, DIVISION, NORTH CENTRAL
CORPS OF ENGINEERS

Under the direction of
BRIGADIER GENERAL ROY T DODGE, DIVISION ENGINEER

SCALE OF MILES
50 0 50 100

NOTE Includes all American Domestic Traffic and American Import and Export Traffic.

Does not include all Foreign Traffic between Foreign Ports.

Quantities expressed in short tons of 2,000 lbs.

MINNESOTA

625,508

S-265,682
DULUTH

SUPERIOR
S-359,826

623,308

MICHIGAN

568,392

1,193,900

WISCONSIN

350,332

MICHIGAN

22,182

CARROLLTON

1,218,082

R-407,032
TORONTO

1,216,357

R-66,289
HAMILTON

MILWAUKEE 19,941

548,451

INTRAPORT- 41,485
CHICAGO HARBOR

74,633

273,818

CALUMET HARBOR 71,383

MICHIGAN CITY
S-33,150

S-532,742
TOLEDO

1,688,268

R-59,156
CLEVELAND

42,319

139,853

11,884

210,228

54,213

IOWA

ILLINOIS

INDIANA

OHIO

PENNSYLVANIA

N E

CO

1964 FL
MOVEME

GREAT LA
U. S. ARM

NOTE Includes all American Domestic Traffic and American Import and Export Traffic

Does not include all Foreign Traffic between Foreign Ports.

Quantities expressed in short tons of 2,000 lbs.

625,508

623,508

568,392

1,193,900

1,216,082

1,216,357

1,216,357

1,666,666

MICHIGAN

MILWAUKEE 19,941

348,451

INTRAPORT 41,485
CHICAGO HARBOR

74,833

473,818

CALUMET HARBOR 27,383

43,319

136,883

11,884

MICHIGAN CITY
S-33,150

CARROLLTON 22,182

S-532,742
TOLEDO

R-59,156
CLEVELAND

R-407,022
TORONTO

R-66,289
HAMILTON

INDIANA

OHIO

PENNSYLVANIA

NEW YORK

COMMERCIAL STATISTICS

1964 FLAXSEED AND SOYBEANS MOVEMENTS ON THE GREAT LAKES

PREPARED BY
GREAT LAKES REGIONAL STATISTICAL OFFICE
U. S. ARMY ENGINEER, DIVISION, NORTH CENTRAL
CORPS OF ENGINEERS

Under the direction of
BRIGADIER GENERAL ROY T. DODGE, DIVISION ENGINEER

SCALE OF MILES
50 0 50 100

Overseas Import and Export Traffic

ALL COMMODITIES

Quantities expressed in short tons of 2,000 lbs.

MINNESOTA

WISCONSIN

MICHIGAN

ILLINOIS

INDIANA

OHIO

PENNSYLVANIA

CANADA

2,494,442

45,115

S-1,409,299
R-43,044
DULUTH

SUPERIOR
R-2,071
S-1,085,143

1,913,780

896,725

4,310,202

941,840

1,221,337

881,880

881,886

1,720,722

142,266

4,100

4,432,488

935,840

S-94,423
R-14,765
GREEN BAY

S-615
MANITOWOC
R-74

R-16,347
MUSKEGON
S-27,771

S-359,185
MILWAUKEE
R-109,876

S-49,971
KENOSHA
R-6,593

R-7,645
SOUTH HAVEN
S-152

R-291,954
S-489,462
CHICAGO HARBOR

S-784,119
CALUMET HARBOR
R-395,905

GARY S-1
BUFFINGTON R-38,393
INDIANA HARBOR
R-15,173
S-10,061

S-55,552
BANGOR
R-2,518

S-30,448
CARROLLTON
R-451

BAY CITY R-1,131
S-56,566

S-24,513
PORT HURON
R-2,205

S-96,313
R-211,311
DETROIT

S-146,234
R-204,357 — ROUGE RIVER
ECORSE
R-135,752
S-60,066

R-267
MONROE

S-641,909
TOLEDO
R-109,627

1,609,459

LORAIN
S-5,656

R-231,841
CLEVELAND
S-82,557

ASHTABULA
R-99,770
S-2,858

ERIE
R-19,440
S-8,023

R-25,036
BUFFALO HARBOR
S-60,477

5,381,075

1,985,546

1,940,592

5,520,598

4,676,881

5,421,503

948,148

N E

CO

1964 OV

OF

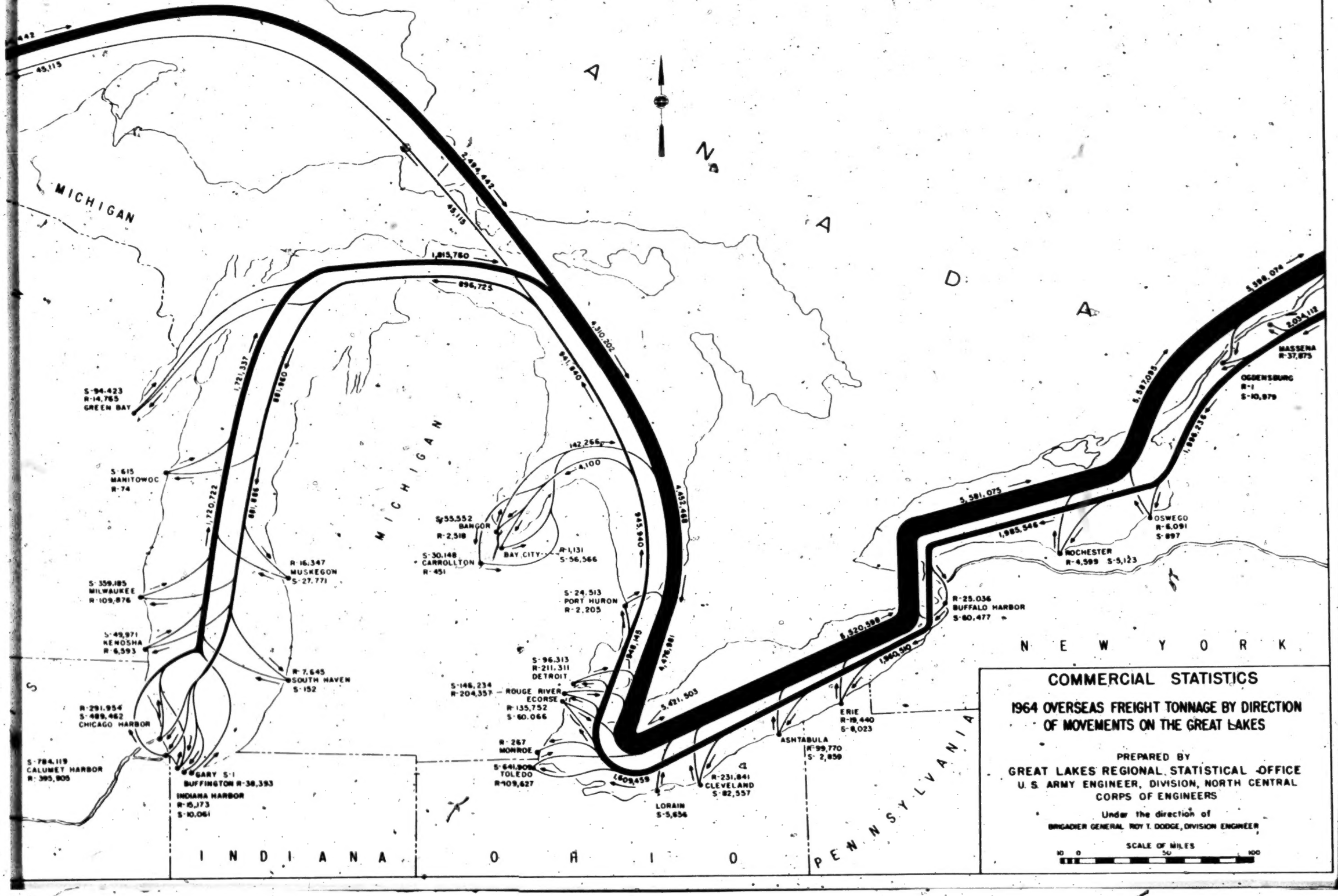
GREAT LA

U.S. AR

Overseas Import and Export Traffic

ALL COMMODITIES

Quantities expressed in short tons of 2,000 lbs.



COMMERCIAL STATISTICS

1964 OVERSEAS FREIGHT TONNAGE BY DIRECTION OF MOVEMENTS ON THE GREAT LAKES

PREPARED BY

GREAT LAKES REGIONAL STATISTICAL OFFICE

U. S. ARMY ENGINEER, DIVISION, NORTH CENTRAL CORPS OF ENGINEERS

Under the direction of

BRIGADIER GENERAL ROY T. DODGE, DIVISION ENGINEER

SCALE OF MILES

50 0 50 100

CANADIAN
IMPORT AND EXPORT TRAFFIC
AT MAJOR PORTS

Quantities expressed in short tons of 2,000 lbs.

5 YEAR COMPARISON OF TRAFFIC	
YEAR	TONS
1960	31,151,621
1961	29,809,479
1962	34,838,702
1963	40,957,982
1965	47,058,464

MINNESOTA
WISCONSIN
MICHIGAN
ILLINOIS
INDIANA
OHIO
PENNSYLVANIA
IOWA
CANADA
LAKE SUPERIOR
LAKE MICHIGAN
LAKE HURON
LAKE ERIE
LAKE ONTARIO
GEORGIAN BAY
NORTH CHANNEL
GREAT LAKES
U.S.

S-3,450,474
R-6,478
PORT ARTHUR
R-137,063
FORT WILLIAM
S-342,290
R-82,660
HERON BAY
S-117,170
MICHIPICOTEN
R-21,711
S-300,954
S-2,335,596
TACONITE
S-681,032
SILVER BAY
R-37,089
S-330,348
DULUTH
SUPERIOR
R-21,883
S-1,838,428
WASHBURN
R-10,160
ASHLAND
R-750
S-160,544
PRESQUE ISLE
S-829,103
R-3,967,154
S-232,287
SAULT STE. MARIE
SAULT STE. MARIE
R-9,145
S-46,199
PORT DOLOMITE
R-4,360
GLADSTONE
ESCANABA
R-1,226
S-171,448
MENOMINEE
R-91,031
S-150
R-41,069
GREEN BAY
MANITOWOC
R-14,931
SHEBOYGAN
R-542
MILWAUKEE
R-284,577
S-217,076
R-2,626
KENOSHA
R-443,803
S-128,104
CHICAGO HARBOR
R-3,190,520
S-1,878,518
CALUMET HARBOR
INDIANA HARBOR
R-2,164,861
S-5,323
GARY
R-21,735--S-7,533
MICHIGAN CITY
R-16,088
TRAVERSE CITY
R-2,573
S-6,400
MANISTEE
LUDINGTON
S-27,415
R-15,055
S-38,536
MUSKEGON
GRAND HAVEN
& FERRYSBURG
S-217,846
HOLLAND
R-14,070
R-1,583
SOUTH HAVEN
R-54,569
S-55,424
BANGOR
R-28,088
S-138,491
CARROLLTON
R-30,754
BAY CITY
SAGINAW
R-108,975
R-1,048,333
S-74,302
PORT OF SARNIA
PORT HURON
R-461 S-374
R-13
MARINE CITY
R-1,208,184
S-360,907
PORT OF WINDSOR
R-1,780,799
S-54,844
DETROIT
R-1,089,982
S-101,502
ROUGE RIVER
ECORSE
R-54,804
S-23,142
WYANDOTTE
R-53,042
S-5,039
TRENTON
R-606,472
R-258,847
S-6,497,208
TOLEDO
PORT CLINTON
R-1,053
SANDUSKY
R-19,877
S-331,995
HURON
R-688,140
S-14,089
LORAIN
R-265,583
S-332,633
MARBLEHEAD
S-39,122
R-191,411
ERIEAU
KINGSVILLE
R-52,425
LEAMINGTON
R-1
CLEVELAND
R-3,961,109
S-128,787
FAIRPORT
R-271,366
S-1,359,625
ASHTABULA
R-2,076,304
S-3,090,460
CONNEAUT-R-1,153,367
S-963,085
R-49,905
S-271,433
ERIE
R-26,993
S-167,111
GODERICH
OWEN SOUND
R-15,669
S-3,840
COLLINGWOOD
R-70,935
MIDLAND
R-3,785
PORT McNICOLL
DRUMMOND ISLAND
S-121,072
S-69,956
KILLARNEY
LITTLE CURRENT
MELDRUM BAY
GORE BAY
S-9,448
BRITT
5,094
PARRY SOUND
DEPOT HARBOR
S-604,719
R-19,907
PORT HOPE
R-5,912
COBOURG
R-6,000
PORT WHITBY
OSHAWA
R-3,324,303-TORONTO S-11
R-619,452-PORT CREDIT
CLARKSON
R-2,838
S-3,377
R-7,539,524
S-17,179
HAMILTON
PORT WELLER R-72,685
R-6,955-WELLAND
THOROLD R-229,385--S-135,810
PORT COLBORNE
R-492,288
S-1287,839
PORT MAITLAND
R-10,311
R-54015
PORT STANLEY
PORT BURWELL
R-360,692
LEWISTON
R-46,127
TONAWANDA
R-72,821
BUFFALO HARBOR
R-2,808,463
S-21,138
R-29,193
BELLEV
TRENTON
R-17,967
R-99,330
49,862
190,499
265,221
5,345,948
9,115,798
10,155,087
288,932
3,084,064
1,132,595
2,528,441
3,877,969
6,310,750
2,698,349
2,526,731
6,170,381
2,492,836
6,154,918
2,018,478
5,838,580
9,832,501
10,935,634
6,738,147
554,333
2,980
4,993
2,875
433,026
10,850
9,512
1,111,309
125,671
14,552,229
7,206,251
1,000
12,741,570
16,100,853
12,035,331
6,291,201
1964 C
GREAT
U.S.

CANADIAN
IMPORT AND EXPORT TRAFFIC
AT MAJOR PORTS

Quantities expressed in short tons of 2,000 lbs.

5 YEAR COMPARISON OF TRAFFIC	
YEAR	TONS
1960	31,151,621
1961	29,809,479
1962	34,838,702
1963	40,957,982
1965	47,058,464

CANADA

MICHIGAN

INDIANA

OHIO

PENNSYLVANIA

NEW YORK

R-82,660 HERON BAY S-117,170

MICHIPICOTEN R-21,711 S-300,954

190,499 265,221 9,115,798 10,155,087 296,932 3,094,044

PRESQUE ISLE S-629,103

R-3,967,184 S-232,287 SAULT STE. MARIE

SAULT STE. MARIE R-8,145

S-46,199 PORT DOLOMITE

DRUMMOND ISLAND S-127,072

LITTLE CURRENT

S-69,856 KILLARNEY

S-9,448 BRITT

MELDRUM BAY

GORE BAY

433,026 170,850 5,094 PARRY SOUND

DEPOT HARBOR S-604,719

R-5,785 PORT McNICOLL

R-70,935 MIDLAND

OWEN SOUND R-15,669 S-3,840

COLLINGWOOD

R-4,360 GLADSTONE

ESCANABA R-1,226 S-171,448

2,528,441 3,877,969 2,698,349 6,310,750 9,838,501

S-574,244 CALCITE

STONE PORT S-171,769

MENOMINEE R-91,031 S-150

R-41,069 GREEN BAY

TRAVERSE CITY R-2,673

2,526,751 6,170,391 10,838,834 4,738,147

S-6,400 MANISTEE

LUDINGTON S-27,415

MANITOWOC R-14,931

SHEBOYGAN R-542

2,482,836 6,154,918

R-26,993 S-157,111 GODERICH

R-54,859 S-55,424 BANGOR

R-28,088 S-138,491 CARROLLTON

R-30,764 BAY CITY

SAGINAW R-108,975

R-15,055 S-38,536 MUSKEGON

MILWAUKEE R-296,577 S-217,076

GRAND HAVEN & FERRYSBURG S-217,846

2,015,478 5,838,390

HOLLAND R-14,070

R-2,625 KENOSHA

R-1,583 SOUTH HAVEN

R-1,048,333 S-74,302 PORT OF SARNIA

PORT HURON R-461 S-374

R-13 MARINE CITY

R-1,208,184 S-360,907 PORT OF WINDSOR

R-1,780,799 S-54,844 DETROIT

R-1,089,982 9-101,502 ROUGE RIVER

ECORSE

WYANDOTTE R-41,082 S-5,039

R-54,804 S-23,142

TRENTON R-604,472

R-443,863 S-128,104 CHICAGO HARBOR

3,190,320 1,878,518 CALUMET HARBOR

MICHIGAN CITY R-16,088

GARY R-21,735--S-7,533

INDIANA HARBOR R-2,164,861 S-5,323

R-258,847 S-6,497,208 TOLEDO

PORT CLINTON R-1,053

MARBLEHEAD S-39,122

SANDUSKY R-19,877 S-331,995

HURON R-488,610 S-14,489

LORAIN R-265,583 S-532,633

CLEVELAND R-3,961,109 S-129,787

FAIRPORT R-271,366 S-1,359,625

ASHTABULA R-2,076,304 S-3,090,480

CONNEAUT-R-1,153,367 S-963,085

R-49,905 S-271,433 ERIE

R-191,411 ERIEAU

KINGSVILLE R-353,325

LEAMINGTON R-1 6,291,201

12,055,331 16,100,655 12,741,570

R-1,208,530 OSHAWA

R-19,907 PORT HOPE

R-9,912 COBOURG

R-6,000 PORT WHITBY

R-3,324,303 -TORONTO S-11

R-619,452 -PORT CREDIT

CLARKSON R-2,638 S-3,377

R-7,539,524 S-17,178 HAMILTON

PORT WELLER R-72,685

R-229,385 S-135,810 THOROLD

R-6,955-WELLAND

PORT COLBORNE R-492,288 S-1,287,839

PORT MAITLAND R-10,311

R-154,015 PORT STANLEY

PORT BURWELL R-360,692

R-6,352 CORNWALL

R-82,767 CARDINAL

R-15-JOHNSTOWN

PRESCOTT R-314,646 S-102,403

R-10,360- BROCKVILLE

R-29,193 BELLEVILLE

TRENTON R-17,967

PICTON S-806,981 R-85,148

KINGSTON R-107,848

12,995,586 12,909,241 4,513,027 84,762

R-13,233 MASSENA

WADDINGTON R-58,455

OGDENSBURG R-116,664 S-110

S-30,240 R-14,794 OSWEGO

14,552,229 7,206,251 38,584 2,451

GREAT SODUS BAY S-1,334,429

41,066 42,066

LEWISTON R-46,127

ROCHESTER R-133,992 S-285,658

TONAWANDA R-72,821

BUFFALO HARBOR R-2,808,463 S-21,136

1,000

COMMERCIAL STATISTICS

1964 CANADIAN FREIGHT TONNAGE BY DIRECTION OF MOVEMENTS ON THE GREAT LAKES

PREPARED BY

GREAT LAKES REGIONAL STATISTICAL OFFICE

U. S. ARMY ENGINEER, DIVISION, NORTH CENTRAL CORPS OF ENGINEERS

Under the direction of

BRIGADIER GENERAL ROY T. DODGE, DIVISION ENGINEER

SCALE OF MILES

10 0 50 100

DOMESTIC TRAFFIC

Quantities expressed in short-tons of 2,000 lbs.

MINNESOTA

S-6,328,303
R-462,383
TACONITE

R-280,553
SILVER BAY
S-10,721,795

S-17,156,639
R-2,362,607
DULUTH

SUPERIOR
S-16,507,052
R-2,171,428

WASHBURN
R-474,470

ASHLAND
R-337,103
S-134,056

ONTONAGON
R-16,181

HOUGHTON
R-7,042
S-503

R-22,216
HANCOCK

R-162,000
TORCH LAKE

DOLLAR BAY
R-276,048

R-151,599
PRESQUE ISLE
S-6,153,228

MARQUETTE
R-438,660
S-951,586

R-36,319
MUNISING
S-702

MICHIGAN

S-735
SAULT STE. MARIE
R-229,434

S-4,894,091
PORT INLAND

S-3,389,672
PORT DOLOMITE

R-215,427
LIME ISLAND

R-289,815
DETOUR

MACKINAC HBR.

ST. IGNACE

R-274,489
GLADSTONE

MANISTIQUE
R-64,598
S-69,158

R-189,856 WELLS

R-200,072
S-241,479

157,878

ESCANABA
R-500,356
S-7,034,910

MACKINAW CITY
R-271,873
S-73,072

R-92,726
CHEBOYGAN

R-150,355
PETOSKEY

S-156,212

S-12,547,081
R-560,960
CALCITE

ADVANCE-R-61,966

STONE PORT
R-307,865

S-4,431,047

BAY SHORE
R-531,320
S-2,041,732

CHARLEVOIX
S-1,154 -- R-25,470

BOYNE CITY
R-8,749

ALPENA
R-143,174

R-216,607
S-63,437
MENOMINEE

MARINETTE
R-82,328

S-111
STURGEON BAY
R-15,949

S-4,424
R-2,336,819
GREEN BAY

R-196,617
TRAVERSE CITY

HARRISVILLE
R-98,518

R-957,906
FRANKFORT
S-465,270

PORT GYPSUM
S-276,958

R-25,159-DE PERE

R-404,724
KEWAUNEE
S-748,769

R-79,786-TWO RIVERS

S-978,204
MANITOWOC
R-1,132,758

S-363,178
R-128,461
MANISTEE

ALABASTER
S-507,014

FILER CITY - R-135,983

LUDINGTON
R-2,652,786
S-1,223,888

R-463,849
SHEBOYGAN

S-27,224
WHITE LAKE

HARBOR BEACH
R-31,687

S-54,921
R-560,920
BANGOR

R-3,061,104
ESSEXVILLE

R-72,299
ZILWAUKEE

R-299,544
CARROLLTON
S-70,899

BAY CITY
R-137,655

SAGINAW
R-708,071

R-733,015
PORT WASHINGTON

S-635,516
MUSKEGON
R-2,616,457

R-4,046,483
S-1,364,245
MILWAUKEE

GRAND HAVEN
& FERRYSBURG
R-432,918
S-571,943

S-127,760
R-653,591
PORT HURON

R-2,448,655-OAK CREEK

R-304,540-MARYSVILLE

R-3,578,070-ST. CLAIR

RACINE
R-15,420

HOLLAND
R-173,051
S-6,417

R-73,298-MARINE CITY

ALGONAC
R-3,644

R-9,410,686
S-19,348
DETROIT

S-1,050
WAUKEGAN
R-469,287

R-71,845
SOUTH HAVEN

S-600,491
R-11,440,352-ROUGE RIVER

R-430,253
S-4,500
ST JOSEPH &
BENTON HARBOR

R-510,654 -- S-66,138 -ECORSE
WYANDOTTE

R-3,365,502 --- S-93,781

CHICAGO HARBOR

R-2,722,685 --- S-37,861 -TRENTON

R-28,522
MONROE

R-9,387,518
CALUMET HARBOR

MICHIGAN CITY — S-84,152

GARY — S-258,045

BUFFINGTON — S-162,432

INDIANA HARBOR
S-864,373

S-26,947,227
R-6,734,637 -- TOLEDO

MARBLEHEAD
R-714,132

SANDUSKY
R-1,051
S-2,414,666

HURON
R-806,701
S-236,280

LORAIN
R-3,987,408
S-1,615,949

CLEVELAND
R-15,497,027
S-235,523

R-1,380,499
FAIRPORT
S-382,126

ASHTABULA
R-5,587,642
S-742,554

CONNEAUT-R-3,518,990
S-297,641

R-614,858
ERIE - S-755,997

DUNKIRK
R-2,966

BUFFALO HARBOR
R-12,857,692
S-983,217

S-72,941
R-268,775
TONAWANDA

S-28,815
NIAGARA FALLS

341,844

615,633

2,043

4,631

1,550

84,031

1,104,169

13,504,899

2,529,463

43,888,559

61,236,488

13,899,349

57,923,078

5,619,802

50,846,945

5,684,176

57,923,078

5,909,575

9,424,731

11,877,807

17,887,382

62,972,820

34,373,213

5,836,693

34,059,342

6,392,615

11,253,556

30,854,329

7,572,220

2,572,153

1,095,432

1,335,882

288,823

43,230

1,180,635

8,653,216

8,900

37,653

11,842,196

1,498,852

785,546

1,477,967

364,443

282,205

40,096

13,780,066

2,784,124

132,370

7,164

60,703,446

17,851,690

I O W A

I L L I N O I S

W I S C O N S I N

M I C H I G A N

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O H I O

P E N N S Y L V A N I A

C A N A D A

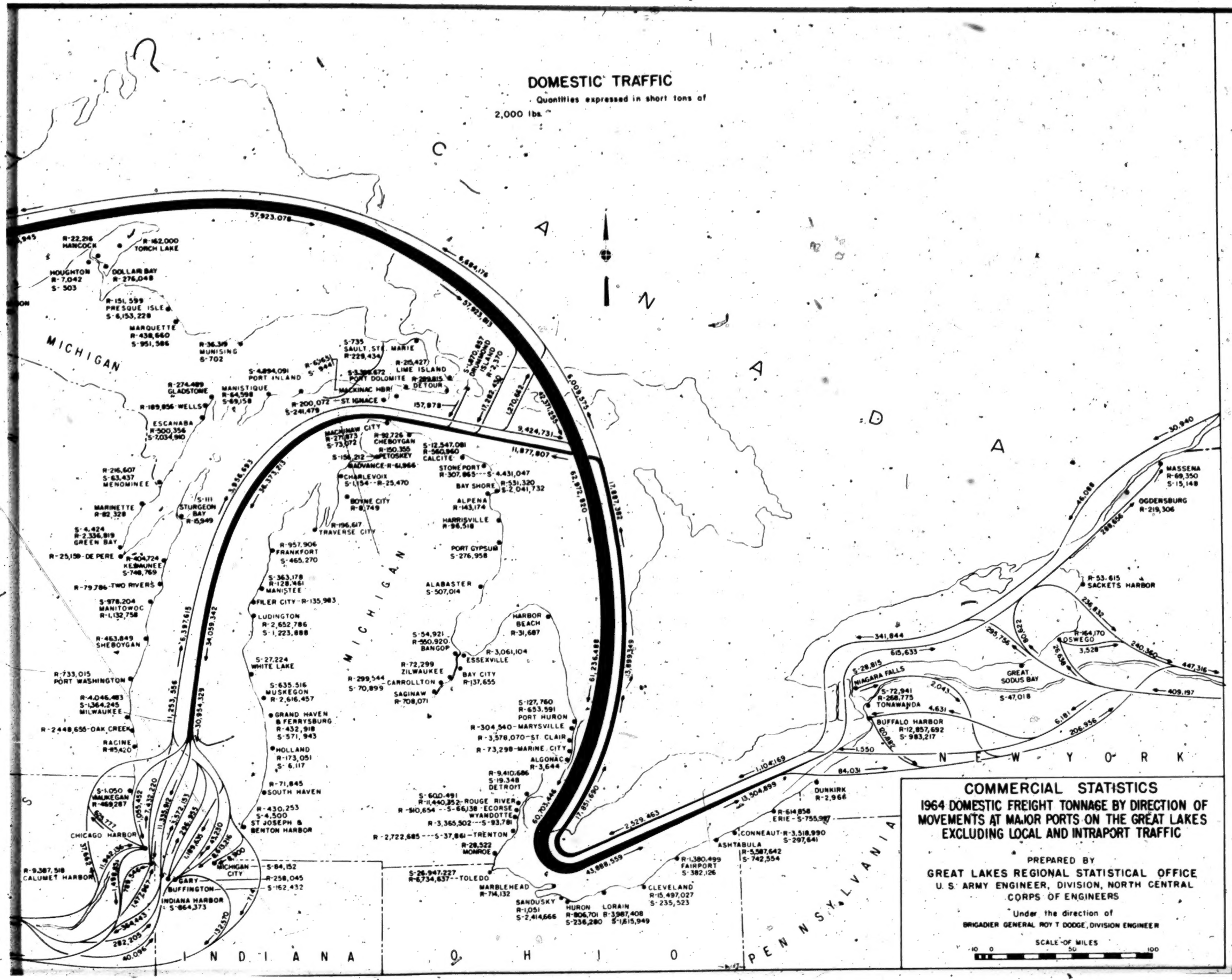
N

CO
1964 DOME
MOVEMENT
EXCLU

GREAT L
U. S. ARM

DOMESTIC TRAFFIC

Quantities expressed in short tons of 2,000 lbs.



COMMERCIAL STATISTICS

1964 DOMESTIC FREIGHT TONNAGE BY DIRECTION OF MOVEMENTS AT MAJOR PORTS ON THE GREAT LAKES EXCLUDING LOCAL AND INTRAPORT TRAFFIC

PREPARED BY

GREAT LAKES REGIONAL STATISTICAL OFFICE
U. S. ARMY ENGINEER, DIVISION, NORTH CENTRAL
CORPS OF ENGINEERS

Under the direction of
BRIGADIER GENERAL ROY T DODGE, DIVISION ENGINEER

SCALE OF MILES
10 0 50 100

LIBRARY
SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-426

LAKE CARRIERS' ASSOCIATION and
AMERICAN STEAMSHIP COMPANY, *et al.*,
Appellants,

vs.

RALPH A. MacMULLAN,
Individually and as Director,
Michigan Department of Natural Resources, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION.

MOTION FOR TEMPORARY RESTRAINING ORDER.

SCOTT H. ELDER,
2700 Terminal Tower,
Cleveland, Ohio 44113,
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2700 Terminal Tower,
Cleveland, Ohio 44113.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

In the Supreme Court of the United States

OCTOBER TERM, 1971.

No. _____.

LAKE CARRIERS' ASSOCIATION and
AMERICAN STEAMSHIP COMPANY, *et al.*,

Appellants,

vs.

RALPH A. MacMULLAN,
Individually and as Director,
Michigan Department of Natural Resources, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION.

MOTION FOR TEMPORARY RESTRAINING ORDER.

To the Honorable Associate Justice Potter Stewart,
Justice for the Sixth Judicial Circuit:

Now come the appellants in the above entitled cause and respectfully move the Court and the single Justice to whom this Motion is presented that the temporary restraining order originally issued by the United States District Court, Eastern District of Michigan, Southern Division, in Civil Action No. 36194, entered March 16, 1971, be reinstated pending appeal to this Court.

In support of said Motion appellants respectfully show:

I. On March 16, 1971 appellants instituted an action in the United States District Court, Eastern District of Michigan, Southern Division, pursuant to 28 U.S.C. §§ 1131, 1133, 1337, 2201, 2281 and 2284, to test the con-

stitutional validity of the Michigan Watercraft Pollution Control Act of 1970 (Appendix G to Jurisdictional Statement). On said date the Honorable Ralph M. Freeman, District Judge, entered a temporary restraining order enjoining certain officials of the State of Michigan from enforcing the Michigan Watercraft Pollution Control Act of 1970 as against appellants' federally licensed vessels engaged in interstate and/or foreign commerce on the Great Lakes (Appendix B attached to Jurisdictional Statement).

2. On April 26 and 27, 1971, a full evidentiary hearing was conducted following which the Court heard oral arguments and requested the submission of briefs.

3. On July 12, 1971 the District Court rendered its Memorandum Opinion dissolving the existing temporary restraining order and dismissing the action without prejudice to plaintiffs' instituting other appropriate legal proceedings (The District Court's Memorandum Opinion attached as Appendix A to Jurisdictional Statement).

4. On July 29, 1971, appellants filed in the District Court a motion to reinstate the temporary injunction pending appeal (Motion in District Court attached as Appendix D to Jurisdictional Statement; Brief in Support of Motion attached as Appendix E to Jurisdictional Statement).

5. On September 15, 1971 the District Court rendered its opinion and order (attached hereto as Exhibit A) denying appellants' motion to reinstate the temporary restraining order originally entered March 16, 1971.

6. In denying appellants' motion to reinstate the temporary injunction, the District Court held that an injunction from a federal court suspending the possible enforcement of the Michigan statute was not appropriate until the statute had been interpreted by a Michigan Court, relying upon *Askew vs. Hargrave,* 401 U.S. 476 (1971) and *Reetz vs. Bozanich,* 397 U.S. 82, 85 (1970).

7. Appellants respectfully submit that the District Court's reliance on *Reetz v. Bozanich, supra,* is misplaced in that such case involved a classic example of where the nub of the controversy turned on the state constitution. Consequently it was appropriate for a state court to make the first judicial application of the state constitutional provisions involved. This Court has said, however, that the judicially created rule of abstention should be applied only where "the issue of state law is uncertain." *Harman v. Forssenius,* 380 U.S. 528 (1965). Moreover, abstention is applicable only in narrowly limited special circumstances. *Zwickler vs. Koota,* 389 U.S. 241 (1967). In this instance a state court construction could not render unnecessary a decision of the federal issues joined on the pleadings and the evidence in the trial court. Thus there are no special circumstances warranting application of the abstention doctrine.

8. Appellants respectfully submit that a federal court has the duty of giving due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims; that a statutory construction by the state courts of the Michigan Watercraft Pollution Control Act of 1970 would not avoid or modify the constitutional question; that the principle of abstention cannot be used simply to give the state courts the first opportunity to vindicate a federal claim; and that the delay from requiring recourse to the state courts might "chill" the federal constitutional right which appellants seek to protect because appellants appeal will be rendered moot if Michigan is permitted to enforce its Act during the pendency of this appeal, all as more fully appears from the brief submitted herewith as Appendix E to the Jurisdictional Statement.

9. Even were the District Court correct in applying the abstention doctrine, it should have, in accordance with *City of Meridian vs. Southern Bell Tel. & Tel. Co.,* 358 U.S.

639 (1959), held the case while the parties repaired to a state tribunal for an authoritative declaration of applicable state law. Instead, the District Court dismissed the complaint without prejudice and dissolved the temporary restraining order, thus leaving appellants in the intolerable situation of not being able to enter Michigan waters except in violation of law.

10. Appellants respectfully submit that the issues in this case are simple and straightforward. Can the State of Michigan, as a prerequisite to federally licensed vessels engaged in interstate and foreign commerce entering its waters, require that such vessels install holding tanks or incinerating devices? This involves no delicate issue of state law. The Michigan Watercraft Pollution Control Act of 1970 is not susceptible of a construction by the state courts that would avoid or modify the constitutional questions involved.

11. Unless the status quo is preserved pending appeal, appellants will be compelled to proceed with the installation of holding tanks or incinerating devices thus causing them irreparable damage and injury should they be successful on this appeal, which for all practical purposes will be rendered moot.

It is respectfully requested that this Honorable Court reinstate the temporary injunction originally entered on March 16, 1971 pending this appeal.

Respectfully submitted,

SCOTT H. ELDER,
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Cleveland, Ohio 44113,
Attorney for Appellants.

JOHNSON, BRANAND & JAEGER,
2700 Terminal Tower,
Cleveland, Ohio 44113,
Of Counsel.

EXHIBIT A.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION.

Civil Action No. 36194.

LAKE CARRIERS' ASSOCIATION and
AMERICAN STEAMSHIP COMPANY, *et al.*,

Plaintiffs,

vs.

RALPH A. MacMULLAN, *et al.*,

Defendants.

OPINION AND ORDER.

Before EDWARDS, *Circuit Judge,* and KEITH and PRATT, *District Judges.*

PRATT, *District Judge.*

Plaintiffs in this proceeding have filed a motion requesting a continuation of the temporary restraining order entered prior to the hearing in this cause or other similar injunctive relief to prevent enforcement by the State of Michigan of Act 167, Public Acts of 1970, pending an appellate court ruling on this Court's opinion and order of July 12, 1971. The effect of the July 12, 1971 order was to dissolve the pre-existing temporary restraining order and dismiss the action.

Plaintiffs' motion was accompanied by an extensive brief as was defendants' response in opposition to the motion. By agreement of the parties, the motion will be considered on the briefs without oral argument.

The authority of this Court to grant an injunction is not questioned. It continues throughout the period of

appeal. Federal Rules of Civil Procedure Rule 62(c), 28 U.S.C.; *Newton v. Consolidated Gas Company*, 258 U.S. 165, 177 (1922); *United States v. El-O-Pathic Pharmacy*, 192 F.2d 62, 79 (C.A. Cal. 1951).

However, the Rule provides that the decision to grant an injunction is a matter within the discretion of the Court. It is, therefore, incumbent upon plaintiffs to establish that immediate and irreparable injury will result if injunctive relief is withheld. This plaintiffs have not done.

This Court's earlier opinion indicated that an injunction from a federal court suspending the possible enforcement of the Michigan statute was inappropriate until the statute had been interpreted by a Michigan Court. Thus this Court dissolved the existing temporary restraining order, dismissed the action, and abstained from further determinations. This holding is strengthened by the recent decision of *Askew v. Hargrave*, 401 U.S. 476 (1971) which strongly endorsed the abstention guidelines of *Reetz v. Bozanich*, 397 U.S. 82, 85 (1970).

Moreover, plaintiffs have indicated no change in the facts of this case nor the attitudes of those Michigan officials charged with enforcing the statute in question that would indicate a threat of immediate and irreparable harm to plaintiffs. In their response to the motion, defendants have again indicated that the State of Michigan hopes to obtain compliance with its water pollution standards without resort to criminal prosecution. To enjoin the enforcement of a statute under which prosecution is neither pending nor foreseeable would be an idle gesture.

For the reasons given, plaintiffs' motion must be DENIED. IT IS SO ORDERED.

/s/ GEORGE C. EDWARDS, Jr.,
United States Circuit Judge,

/s/ DAMON J. KEITH,
United States District Judge,

/s/ PHILIP PRATT,
United States District Judge.

Dated: September 15, 1971.

No. 71-422

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

LAKE CARRIERS' ASSOCIATION and AMERICAN STEAMSHIP COMPANY, et al.,

Appellants,

vs.

RALPH A. MacMULLAN, Individually and as Director, Michigan Department of Natural Resources, et al.,

Appellees.

On Appeal from the United States District Court
For the Eastern District of Michigan
Southern Division

RESPONSE IN OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER

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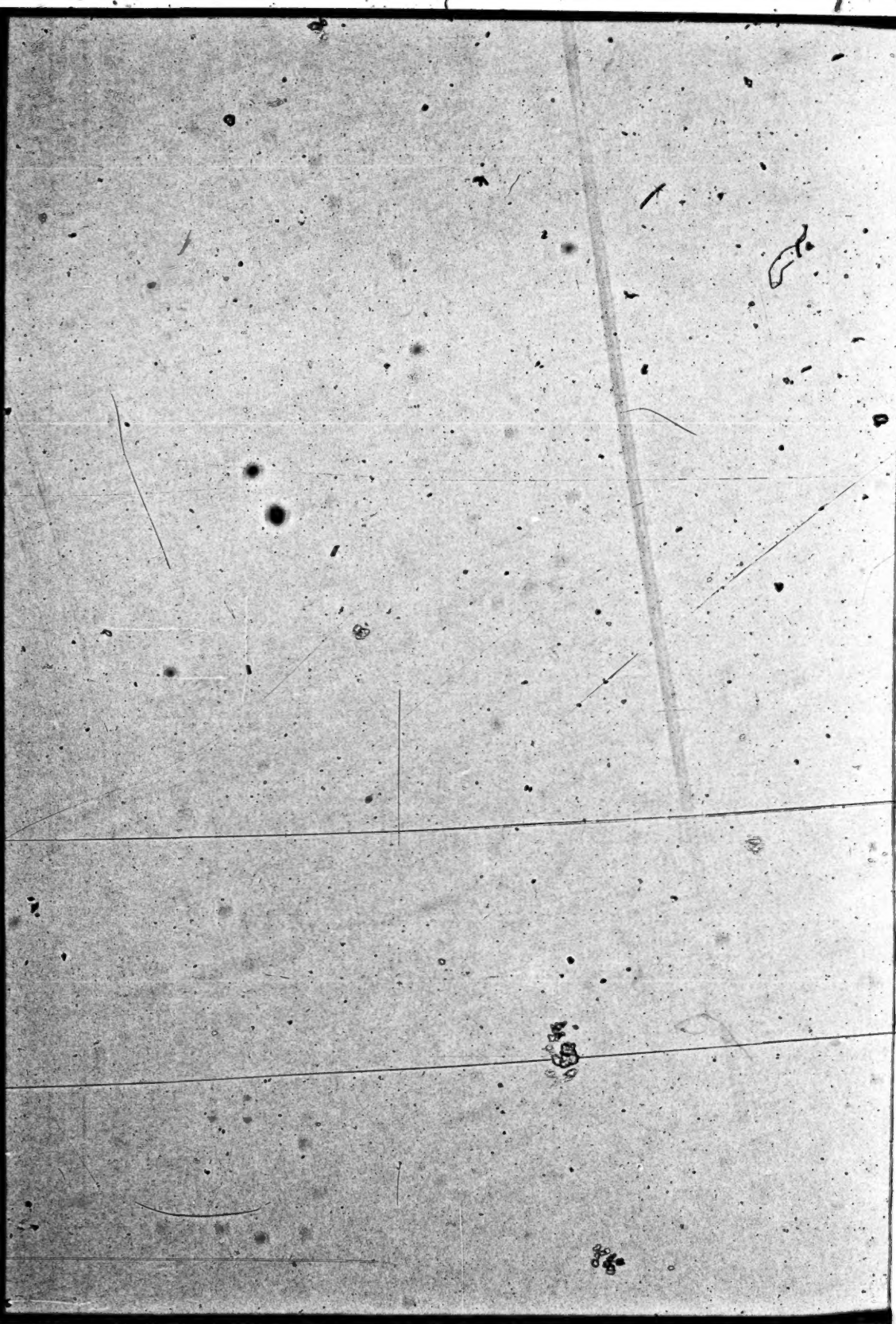

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-422

LAKE CARRIERS' ASSOCIATION and AMERICAN STEAMSHIP COMPANY, et al.,

Appellants,

vs.

RALPH A. MacMULLAN, Individually and as Director, Michigan Department of Natural Resources, et al.,

Appellees.

On Appeal from the United States District Court For the Eastern District of Michigan Southern Division

---

RESPONSE IN OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER

NOW COMES the State of Michigan to respectfully oppose the Motion for Temporary Restraining Order, or in the alternative, that the District Court Opinion and Order dated September 15, 1971, attached hereto as Appendix A, and denying appellants' motion to reinstate the temporary restraining order entered March 16, 1971, be affirmed.

I.

THE PROCEEDINGS IN THE DISTRICT COURT

In support of said motion, appellees respectfully show:

1. That, after full evidentiary hearings on April 26 and 27, 1971, oral arguments and submission of briefs, the District Court, on July 12, 1971, rendered its Memorandum Opinion dissolving the temporary restraining order issued to appellants on March 16, 1971, and dismissed the action without prejudice to appellants instituting other appropriate legal proceedings. (The Memorandum Opinion is Appendix B attached to appellees' Motion to Dismiss Appeal; and is hereto attached as Appendix B.)

2. The District Court's Memorandum Opinion, on the evidence presented, held that appellees have sought the voluntary cooperation of appellants in implementing Act 167 of the Public Acts of 1970, State of Michigan, and have not instigated nor threatened criminal prosecution of appellants under the statute and, upon the facts presented, prosecution of appellants does not appear imminent.

3. The Memorandum Opinion further held that appellants sought merely an advisory opinion effecting prohibition of state action in the field of Great Lakes water pollution until the federal government manifests its intention and takes control.

4. The District Court's Opinion and Order of September, 15, 1971, in denying appellants' Motion of July 29, 1971, requesting reinstatement of the temporary injunction pending appeal, held that appellants had failed to establish any facts that would indicate a threat by appellees of immediate and irreparable harm to appellants if injunctive relief was withheld.

II.

ARGUMENT

1. Federal interference with a state's good-faith administration of its criminal statutes is peculiarly inconsistent with the federal framework and a showing of special circumstances beyond the injury to every proceeding brought lawfully and in good faith is requisite to a finding by this Court of irreparable injury sufficient to justify the extraordinary writ of injunction appellants here seek. *Dombrowski* v *Pfister*, 380 US 479 (1965); *Cameron* v *Johnson*, 390 US 611 (1968); *Wilson* v *Schnettler, et al*, 365 US 381, 385-386 (1961).

2. This Court may not enjoin the conduct of state officials which is neither threatened nor imminent, and this Court cannot assume, on the record presented by appellants, that appellees will act in such manner as to deprive appellants of their constitution rights and, further, on the evidentiary record there is no state agency or officer that could be sensibly enjoined so as to afford appellants the injunctive relief they now request. *Boyle* v *Landry*, 401 US 77, 27 L Ed 2d 696, 91 S Ct 758 (1971); *Younger* v *Harris, Jr., et al.*, 401 US 37, 27 L Ed 2d 669, 91 S Ct 746 (1971).

3. Even assuming Act 167 of the Public Acts of 1970, State of Michigan, is unconstitutional, which is denied, that fact would not justify present injunctive relief against good-faith attempts to enforce it, and appellants have failed to make any showing to the District Court of bad faith, harassment, or any other unusual circumstances that would call for grant of that relief. *Younger* v *Harris, Jr., et al*, supra [27 L Ed 2d 669, 681 (1971)].

4. That a greater burden is placed upon appellants to establish irreparable injury than when only private interests are involved, and appellants are not entitled to the relief requested, particularly where the injunctive order of this Court will adversely affect the public interest of appellees in enforcement of Act 167 of the Public Acts of 1970, State of Michigan. *Yakus* v *United States,* 321 US 414, 440-441 (1944); *Virginia Railway Company* v *United States,* 272 US 658, 672-673 (1926); *Petroleum Exploration, Inc.* v *Public Service Commission,* 304 US 209, 222-223 (1938); *Virginia Railway Company* v *Systems Federation,* 300 US 515, 552 (1937); *American Book Company* v *Blount, et al,* 295 F Supp 1189, 1191 (1969).

5. Appellants' petition for a temporary restraining order is not accompanied by motion for leave to file such petition, as required by Rule 31(1) and is subject to dismissal under Rule 16(1)(a), not having been taken in conformity to the Rules of Practice of this Court.

III.

CONCLUSION

The findings of the District Court have been made upon consideration of all material facts presented by appellants, after full evidentiary hearing upon appropriate evidence duly considered and properly applied by that Court. Appellants have failed to present any legal basis establishing that those findings were not made in accordance with law, or in violation of constitutional guarantees, or under facts establishing their entitlement to the injunctive relief they now seek.

Appellees respectfully request that this Honorable Court deny appellants' motion to reinstate the temporary injunction filed in this cause.

Respectfully submitted,

FRANK J. KELLY
Attorney General

Steward H. Freeman
Assistant Solicitor General

Jerome Maslowski
Francis J. Carrier
Assistant Attorneys General

Attorneys for Appellees

DATED:

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LAKE CARRIERS' ASSOCIATION and AMERICAN STEAMSHIP COMPANY, et al., Plaintiffs, vs. RALPH A. MacMULLAN, et al., Defendants.	Civil Action No. 36194

OPINION AND ORDER

Before EDWARDS, Circuit Judge, and KEITH and PRATT, District Judges.

PRATT, District Judge.

Plaintiffs in this proceeding have filed a motion requesting a continuation of the temporary restraining order entered prior to the hearing in this cause or other similar injunctive relief to prevent enforcement by the State of Michigan of Act 167, Public Acts of 1970, pending an appellate court ruling on this Court's opinion and order of July 12, 1971. The effect of the July 12, 1971 order was to dissolve the pre-existing temporary restraining order and dismiss the action.

Plaintiffs' motion was accompanied by an extensive brief as was defendants' response in opposition to the

motion. By agreement of the parties, the motion will be considered on the briefs without oral argument.

The authority of this Court to grant an injunction is not questioned. It continues throughout the period of appeal. Federal Rules of Civil Procedure Rule 62(c), 28 U.S.C.; *Newton* v. *Consolidated Gas Company,* 258 U.S. 165, 177 (1922); *United States* v. *El-O-Pathic Pharmacy,* 192 F. 2d 62, 79 (C.A. Cal. 1951).

However, the Rule provides that the decision to grant an injunction is a matter within the discretion of the Court. It is, therefore, incumbent upon plaintiffs to establish that immediate and irreparable injury will result if injunctive relief is withheld. This plaintiffs have not done.

This Court's earlier opinion indicated that an injunction from a federal court suspending the possible enforcement of the Michigan statute was inappropriate until the statute had been interpreted by a Michigan Court. Thus this Court dissolved the existing temporary restraining order, dismissed the action, and abstained from further determinations. This holding is strengthened by the recent decision of *Askew* v. *Hargrave,* 401 U.S. 476 (1971) which strongly endorsed the abstention guidelines of *Reetz* v. *Bozanich,* 397 U.S. 82, 85 (1970).

Moreover, plaintiffs have indicated no change in the facts of this case nor the attitudes of those Michigan officials charged with enforcing the statute in question that would indicate a threat of immediate and irreparable harm to plaintiffs. In their response to the motion, defendants have again indicated that the State of Michigan hopes to obtain compliance with its water pollution standards without resort to criminal prosecution. To enjoin the

enforcement of a statute under which prosecution is neither pending nor foreseeable would be an idle gesture.

For the reasons given, plaintiffs' motion must be DENIED. IT IS SO ORDERED.

George C. Edwards, Jr. /s/
United States Circuit Judge

Damon J. Keith /s/
United States District Judge

Philip Pratt /s/
United States District Judge

Dated: September 15, 1971.

U. S. District Court)
Eastern District of Mich.) ss

I hereby certify that the foregoing is a true copy of the original on file in this court and cause.

FREDERICK W. JOHNSON, Clerk

By:
Deputy Clerk

Dated:

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LAKE CARRIERS' ASSOCIATION and AMERICAN STEAMSHIP COMPANY, et al., Plaintiffs, vs. RALPH A. MacMULLAN, et al., Defendants.	Civil Action No. 36194

MEMORANDUM OPINION

Before EDWARDS, Circuit Judge, and KEITH and PRATT, District Judges.

PRATT, District Judge:

Plaintiffs in this proceeding are the Lake Carriers' Association and 19 of its 21 member companies who own and operate Great Lakes cargo vessels. Defendants are the Attorney General of the State of Michigan, the Michigan Department of Natural Resources and its Director and the Michigan Water Resources Commission and its Executive Secretary.

The complaint seeks a declaratory judgment holding that the Michigan Water Pollution Act of 1970 (Act 167 of Public Acts of 1970) is constitutionally infirm and con-

flicts with federal legislation, and correspondingly, requests that the State of Michigan be enjoined from enforcing that Act.

A three judge court was convened pursuant to Section 2284 of Title 28 of the United States Code and a hearing was conducted on April 26 and 27, 1971.

The plaintiffs present five major issues as the basis for relief:

1. That the federal government has pre-empted the field of pollution control in the waters of the Great Lakes and that the Michigan Water Pollution Act conflicts with a federal statute, specifically (Water Pollution Control Act as amended by the Water Quality Improvement Act of 1970, 33 U.S.C. Sec. 1151 et seq.); the said federal statute manifests the intention of the federal government to occupy the field exclusively; and that federal vessel inspection laws, administered by the U. S. Coast Guard, preclude state prescription of shipboard equipment.

2. That the Michigan Water Pollution Act places an undue burden on interstate commerce.

3. That the Michigan Water Pollution Act interferes materially with uniform maritime law.

4. That the Michigan Water Pollution Act denies plaintiffs due process and the equal protection of the laws.

5. That the language and provisions of the Michigan Water Pollution Act are unconstitutionally vague and, thus, unenforceable.

Great Lakes shipping can be characterized as a large, vital and sophisticated industry. It traverses all of the

Great Lakes, the connecting waterways and tributaries and touches upon the states of Minnesota, Wisconsin, Illinois, Indiana, Michigan, Ohio, Pennsylvania and New York and the Canadian provinces of Ontario and Quebec. The advent of the St. Lawrence Seaway System provides an international flavor to shipping on the Great Lakes.

As an example of the size and scope of the industry, as of January 1, 1970, there were a total of 442 vessels in excess of 1,000 tons on the Great Lakes. Of this total, 263 were vessels of United States Registry, having a combined tonnage of 1,802,776 gross tons, and 179 were vessels of Canadian Registry having a combined tonnage of 1,576,165 gross tons. Flow charts indicate that the total commerce of the lakes in 1964 was 210,830,576 short tons with the primary commodities being iron ore, coal, grain, stone, petroleum, cement and sand and gravel. Of this commerce, about one-third (approximately 72 million short tons) utilizes or touches Michigan ports. A resume of trade patterns and courses shows that Great Lakes cargo vessels cross and criss-cross during the shipping season from a great variety of ports within the Great Lakes waterway system, and may enter a particular state's waters frequently without touching at a port in that state. Generally, if recommended navigational courses are followed, the vessels do not, while traversing open waters come within three miles of land except when entering or leaving a port or when in a connecting waterway.

A typical or average Great Lakes cargo vessel would be between 500 and 600 feet in length, have a gross tonnage of 7,500 tons and a carrying capacity of 12,000 gross tons. It is a flat-decked vessel except for the "houses" fore and aft where are located the crew quarters, machinery, supplies, navigational and other equipment necessary to the operation of the vessel. The center length of the vessel is

devoted to cargo. Crew sizes range from 30 to 35 men per vessel and it is estimated each man daily generates 125 gallons of liquid waste (including wash and bathing water and sanitary flush water).

Recognizing the need for pollution control devices and systems, a part at least of the Great Lakes shipping industry has taken some steps in the direction of reducing the discharge of pollutants. Approximately 30 ships have installed a macerating-chlorinating system and another 26 (including four Canadian registry vessels) have installed biogest systems. Other systems are also being tried empirically aboard some vessels, and are of the incinerating or of the "package-treatment plant" type.

It is within the foregoing context that the State of Michigan enacted the Water Pollution Control Act of 1970, and began its implementation by, first, enforcing the requirements relating to pleasure craft and then by approaching the owners and operators of Great Lakes cargo vessels in order to obtain compliance with the provisions of the Act.

The Water Pollution Control Act of 1970, (a copy of which is attached hereto as Appendix A) as particularly pertinent here, provides that:

> Sec. 3. (1) A person shall not place, throw, deposit, discharge or cause to be discharged into or onto the waters of this state, any litter, sewage, oil or other liquid or solid materials which render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes.

and,

Sec. 4. (2) A person owning, operating or otherwise concerned in the operation, navigation or management of a watercraft having a marine toilet shall not own, use or permit the use of such toilet on the waters of this state unless the toilet is equipped with 1 of the following pollution control devices:

(a) A holding tank or self-contained marine toilet which will retain all sewage produced on the watercraft for subsequent disposal at approved dockside or onshore collection and treatment facilities.

(b) An incinerating device which will reduce to ash all sewage produced on the watercraft. The ash shall be disposed of onshore in a manner which will preclude pollution.

Sec. 11. Any person who violates any provision of this act is guilty of a misdemeanor and shall be fined not more than $500.00. To be enforceable, the provision or the rule shall be of such flexibility that a watercraft owner, in carrying out the provision or rule, is able to maintain maritime safety requirements and comply with the federal marine and navigation laws and regulations.

From the above provisions, it appears that the legislature of the State of Michigan sought to draw a distinction between the discharge of "noxious" materials and the discharge of "sewage" (defined in Section 2(d) as ". . . all human body wastes, treated or untreated."), in the latter instance requiring either a holding tank or an incinerating device, whereas in the former the prohibition does not proscribe the discharge of "treated" material.

As a result of the overtures of state officials, with the aim of establishing voluntary compliance within a reasonable time, some ship owners have installed holding tanks to control sewage discharge; for example, Ford Motor Company has installed two 1,000 gallon holding tanks on each of its six vessels at a cost of approximately $20,000.00 per vessel. The Ford vessels' holding tanks are pumped out at the Ford dock when the ships return to their port by the utilization of septic tank pump-out trucks at a cost of between $50.00 and $70.00 per ship.

The latter finding points up a significant feature, that is, that Michigan has, as yet, provided no pump-out facilities at any of its ports, although it is anticipated that arrangements with municipal authorities or others (including dock owners and ship owners or operators with their own docks) will establish a network of such facilities.

Against this background is superimposed the entry of the federal government by virtue of the Water Quality Improvement Act of 1970, supra, which has as one of its major purposes pollution control of navigable waters, including the Great Lakes system.

In paraphrase, the federal Act provides that as soon as possible after April 3, 1970, the Secretary of Interior shall promulgate federal standards of performance for marine sanitation devices which shall be designed to prevent the discharge of untreated or inadequately treated sewage into or upon the navigable waters of the United States. (Section 1163 (b) (1).) The Act also provides that initial standards and regulations shall become effective for new vessels two years after promulgation and for existing vessels five years after promulgation. (Section 1163 (c) (1).) Subsection (f) of Section 1163 prohibits any state from enforcing any statute or regulation with respect to the design, manu-

facture, or installation or use of any marine sanitation device on any vessel subject to the section after the effective date of the initial standards and regulations promulgated under the section. A state may, however, apply to the Secretary for a regulation prohibiting the discharge of *any* sewage into waters of that state. (Emphasis supplied.)

There is no dispute that the vessels and waters covered by the Federal Act are the same vessels and waters which are the subject matter of this case. The cause of plaintiffs' anxiety and apprehension is not, however, limited to the alleged conflict between the Federal Act and the Michigan Act. For example, pollution control of the waters of the Great Lakes has been a matter of discussion between the governments of the United States and Canada and specific reference has been made to the problem of achieving compatible regulations governing waste disposal by commercial vessels. (Ex. 23, Communique of the Canada/United States Ministerial Meeting on Great Lakes Pollution, June 23, 1970); the Canadian government has circularized to the shipping industry proposed regulations governing sewage and garbage disposal on the Great Lakes waters within its boundaries (Ex. 22); in early 1968, Federal authorities met with representatives of Lake Michigan states regarding pollution control of that Lake and it was there recognized that sewage disposal directly into Lake Michigan waters was a distinct threat to the quality of the Lake (Ex. 21); a bill has been introduced into the Wisconsin legislature which purports to regulate sewage discharge from commercial vessels into the waters of that state (Exhibit D).

Adding to the uncertainties created by the foregoing is the expressed fear of the plaintiffs that Michigan may, administratively or judicially, interpret its statutes to require that Great Lakes vessels install huge holding tanks of a

capacity (40,000 gallons) that would retain for eventual pumping out *all* materials, fluids and substances generated by and on a vessel.

Inherent, then, in this situation, assert the plaintiffs, is the real possibility that each of the governmental units involved, if left to their own devices, would promulgate different, conflicting standards, prohibitively costly and structurally dangerous and, presumably, each statute with a criminal penalty.

But with a recitation of what is, should be coupled a recitation of what is not. In that balance sheet lies the real crux of the issues presented and the role of this Court.

The pollution of our environment has become a major problem of our society. There is hardly an industry, a governmental unit, a citizens' organization—nor even a person—who is not daily confronted with dire warnings regarding the danger confronting our ecology if corrective and reparative steps are not taken immediately. There are a few dissenters and conflicts appear to arise only as to timetables, methods and expense. Investigations, studies, reports, surveys and conferences abound.

Michigan has chosen to promulgate a program, which is original within the Great Lakes region as it respects lakes pollution. No other state, province or national government has, as yet, instituted a Grate Lakes pollution control program although certainly each is involved and concerned. The significant factor is, however, that the plaintiffs here request relief on the basis of an *anticipation* that other governmental units will act, presumably in the imminently near future and that such action will in fact conflict with Michigan standards.

Further, although the plaintiffs asserted that the Michigan statute might or could be interpreted to require holding tanks of 40,000-gallon capacity, there is no substantial grounds for that assertion, particularly in view of the stated position of Michigan authorities that the holding tank provision is aimed at the elimination of the practice of discharging *human wastes* into Michigan waters.

Primary in the factual picture and, therefore, paramount in the Court's consideration, is the attitude of Michigan authorities who seek the cooperation of the industry in the implementation of its program and have not instigated, nor does it appear, threatened criminal prosecutions.

It is this consideration that gives us the starting point of our discussion of the issues.

Wilson v. *Schnettler,* 365 U.S. 381, provides a succinct guideline regarding the role of the federal courts vis a vis state courts, when Justice Whittaker wrote (at page 385):

> There is still another cardinal reason why it was proper for the District Court to dismiss the complaint. We live in the jurisdiction of two sovereignties. Each has its own system of courts to interpret and enforce its laws, although in common territory. These courts could not perform their respective functions without embarrassing conflicts unless rules were adopted to avoid them. Such rules have been adopted. One of them is that an accused "should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial." *Ponzi* v. *Fessenden,* 258 U.S. 254, 260. Another is that federal courts should not exercise their discretionary power "to interfere with or embarrass

> threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent . . . . .'' *Douglas* v. *City of Jeannette, supra,* at 163.

A later exposition of the principle is contained in *Dombrowski* v. *Pfister,* 380 U.S. 479, where it was said (pages 484, 485):

> ''. . . . considerations of federalism have tempered the exercise of equitable power, for the Court has recognized that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework. It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings.''

The impact of *Wilson* and *Dombrowski* is a pervading one, particularly, as here, where dealing as we are with a penal statute, prosecution has not been instituted and threatened prosecution does not appear imminent. (See *Doe* v. *Randall,* 314 F. Supp. 32, D. Minnesota, aff'd *Hodgson* v. *Randall,* 39 L.W. 3505.)

Nor is there any intimation that the ''necessary operation'' of state court machinery would prevent a fair trial.

On the contrary, there is every reason to believe that the Michigan court system, with its declaratory judgment procedures (Michigan Court Rules, GCR 1963, Section 521)

provide full and adequate machinery to insure a fair hearing of plaintiffs' cause. More importantly, there is every reason to believe, that the Michigan courts are eminently qualified to apply constitutional standards studiously and assiduously in their determinations regarding the validity of state statutes.

Reviewing the issues framed previously, there appears to this Court to be compelling reasons to abstain from consideration of the matter in its present posture.

With regard to pre-emption, the Supreme Court in *Swift & Co.* v. *Wickham,* 382 U.S. 111, held that Supremacy Clause cases are not within the purview of a three judge court.

With regard to the other issues, the lack of a justiciable controversy precludes entry of this Court into the matter. No prosecution is pending, nor threatened which would realistically infer that plaintiffs in a trial of a case would be denied the benefits of the Due Process and Equal Protection clauses or that a State court would not consider the other constitutional issues with circumspection and thoroughness in the usual and normal course.

An overview of the factual situation presented by the evidence in this case compels but one conclusion: that the plaintiffs here are seeking an advisory opinion that would have the effect of prohibiting any state action in the field of Great Lakes water pollution until such time as the federal government manifests its intention and takes control. This the Court declines to do, especially upon reflection of the clear direction given by the Supreme Court in *Public Service Commission of Utah, et al.,* v. *Wycoff Company, Inc.,* 344 U.S. 237, which involved an interestingly similar situation.

Summarizing the case before it, the Supreme Court said (page 245):

> "In the first place, this dispute has not matured to a point where we can see what, if any, concrete concrete controversy will develop. It is much like asking a declaration that the State has no power to enact legislation that may be under consideration but has not yet shaped up into an enactment."

And went on to say, (pages 247, 248):

> "Declaratory procedings in the federal courts against state officials must be decided with regard for the implications of our federal system. State administrative bodies have the initial right to reduce the general policies of state regulatory statutes into concrete orders and the primary right to take evidence and make findings of fact. It is the state courts which have the first and the last word as to the meaning of state statutes and whether a particular order is within the legislative terms of reference so as to make it the action of the State. We have disapproved anticipatory declarations as to state regulatory statutes, even where the case originated in and was entertained by courts of the State affected. *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450. Anticipatory judgment by a federal court to frustrate action by a state agency is even less tolerable to our federalism. Is the declaration contemplated here to be *res judicata*, so that the Commission cannot hear evidence and decide any matter for itself? If so, the federal court has virtually lifted the case out of the State Commission before it could be heard. If not, the federal judgment serves no useful purpose as a final determination of rights.

The procedures of review usually afford ample protection to a carrier whose federal rights are actually invaded, and there are remedies for threatened irreparable injuries. State courts are bound equally with the federal courts by the Federal Constitution and laws. Ultimate recourse may be had to this Court by certiorari if a state court has allegedly denied a federal right.

In this case, as in many actions for declaratory judgment, the realistic position of the parties is reversed. The plaintiff is seeking to establish a defense against a cause of action which the declaratory defendant may assert in the Utah courts. Respondent here has sought to ward off possible action of the petitioners by seeking a declaratory judgment to the effect that he will have a good defense when and if that cause of action is asserted. Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action. Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law. *Ten-*

nessee v. *Union & Planters' Bank,* 152 U.S. 454; *The Fair* v. *Kohler Die & Specialty Co.,* 228 U.S. 22; *Taylor* v. *Anderson,* 234 U.S. 74."

For the foregoing reasons, this Court will abstain from further consideration of the matter.

The Court is mindful of the recent action of the Environmental Protection Agency which on May 12, 1971, published a "Notice of Proposed Rule Making". The Notice announces that the Agency proposed to amend 18 CFR Part 640 by the promulgation of marine sanitation standards which would permit the use of described treatment devices. Holding tanks or incinerating devices are not required under the proposed standards. The Notice also provides that interested persons may submit views, comments and recommendations concerning the proposed standard to the Agency within 45 days of publication of the Notice.

Defendants have conceded that pre-emption would take place when the initial standards and regulations become effective. Certainly the current action of the Environmental Protection Agency must be carefully considered by the defendants in the interpretation and enforcement of the Michigan statute. This circumstance serves to emphasize the reluctance and declination of the Court to intrude into a matter which is yet unformed.

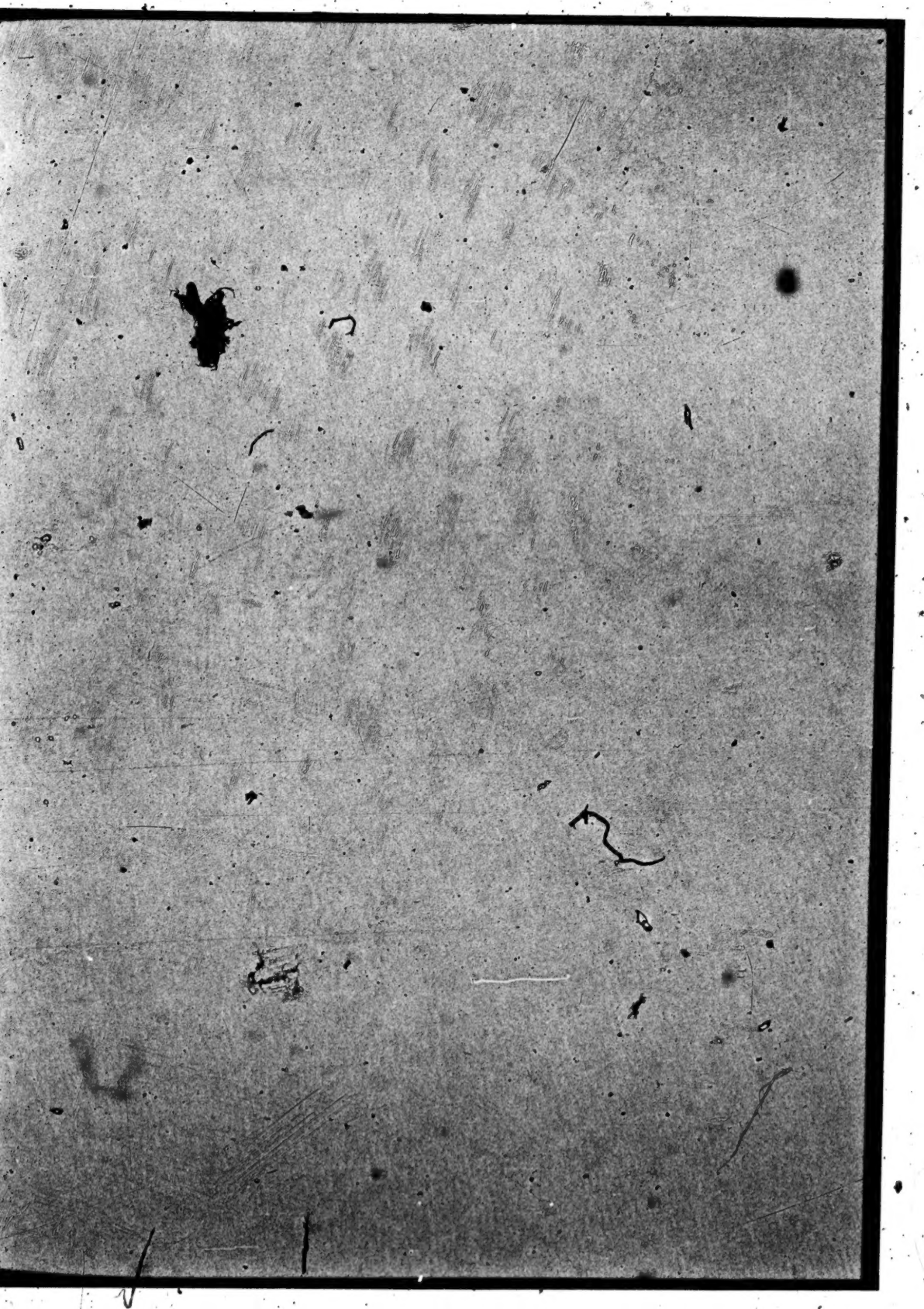
The temporary restraining order heretofore entered is dissolved and the complaint dismissed without prejudice to plaintiffs to institute other appropriate judicial proceedings.

George C. Edwards, Jr. /s/
United States Circuit Judge

Damon J. Keith /s/
United States District Judge

Philip Pratt /s/
United States District Judge

Dated: July 12, 1971.



No. 71-422

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

LAKE CARRIERS' ASSOCIATION and AMERICAN STEAMSHIP COMPANY, et al.,

Appellants,

vs.

RALPH A. MacMULLAN, Individually and as Director, Michigan Department of Natural Resources, et al.,

Appellees.

On Appeal from the United States District Court
For the Eastern District of Michigan
Southern Division

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF

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Application of the Governor, State of Michigan, pursuant to Section 13 of the Federal Water Pollution Control Act, as amended 6

In The

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October Term, 1971

No. 71-422

LAKE CARRIERS' ASSOCIATION and AMERICAN STEAMSHIP COMPANY, et al.,

Appellants,

vs.

RALPH A. MacMULLAN, Individually and as Director, Michigan Department of Natural Resources, et al.,

Appellees.

On Appeal from the United States District Court
For the Eastern District of Michigan
Southern Division

MOTION TO DISMISS OR AFFIRM

Appellees move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the United States District Court for the Eastern District of Michigan, Southern Division, on the grounds that it is manifest that the questions on which decision of this appeal depends are so unsubstantial as not to require further argument.

COUNTER-STATEMENT OF THE CASE

This appeal raises the question of the constitutional validity of Act 167 of the Public Acts of 1970, State of

Michigan (Appendix A). The state statute, as here pertinent, provides:

"Sec. 3. (1) A person shall not place, throw, deposit, discharge or cause to be discharged into or onto the waters of this state, any litter, sewage, oil or other liquid or solid materials which render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes.

"Sec. 4. (2) A person owning, operating or otherwise concerned in the operation, navigation or management of a watercraft having a marine toilet shall not own, use or permit the use of such toilet on the waters of this state unless the toilet is equipped with 1 of the following pollution control devices:

"(a) A holding tank or self-contained marine toilet which will retain all sewage produced on the watercraft for subsequent disposal at approved dockside or onshore collection and treatment facilities.

"(b) An incinerating device which will reduce to ash all sewage produced on the watercraft. The ash shall be disposed of onshore in a manner which will preclude pollution.

"* * *

"Sec. 11. Any person who violates any provision of this act is guilty of a misdemeanor and shall be fined not more than $500.00. To be enforceable, the provision or the rule shall be of such flexibility that a watercraft owner, in carrying out the provision or rule, is able to maintain maritime safety requirements and

comply with the federal marine and navigation laws and regulations."

On March 16, 1971, appellants instituted action in the District Court pursuant to Sections 1331, 1333, 1337, 2201, 2281 and 2284 of Title 28, USC. A temporary order issued on that date, restrained enforcement of the state statute by appellees and was extended to April 26, 1971, the date set for hearing by the three-judge court pursuant to Title 28, USC, § 2284.

The major issues presented by appellants to the trial court were:

1. That the federal government has pre-empted the field of pollution control in the waters of the Great Lakes and that the Michigan Water Pollution Act conflicts with a federal statute, specifically (Water Pollution Control Act as amended by the Water Quality Improvement Act of 1970, 33 U.S.C. Sec. 1151 et seq.); the said federal statute manifests the intention of the federal government to occupy the field exclusively; and that federal vessel inspection laws, administered by the U.S. Coast Guard, preclude state prescription of shipboard equipment.

2. That the Michigan Water Pollution Act places an undue burden on interstate commerce.

3. That the Michigan Water Pollution Act interferes materially with uniform maritime law.

4. That the Michigan Water Pollution Act denies appellants due process and the equal protection of the laws.

5. That the language and provisions of the Michi-

gan Water Pollution Act are unconstitutionally vague and, thus unenforceable.

On April 26 and 27, 1971, a full evidentiary hearing was conducted, following which the Court heard oral arguments and requested submission of briefs.

On July 12, 1971, the District Court rendered its Memorandum Opinion dissolving the temporary restraining order and dismissing the action without prejudice to appellants instituting other appropriate legal proceedings (Appendix B).

On July 29, 1971, appellants filed motion to reinstate the temporary injunction pending appeal and, on September 15, 1971, the District Court rendered its Opinion and Order, (Appendix C), denying appellants' motion to reinstate the temporary restraining order originally entered March 16, 1971.

In denying appellants' motion to reinstate the temporary injunction, the District Court ruled that an injunction from the federal court suspending possible enforcement of the Michigan statute is not appropriate until the statute has been interpreted by a state tribunal, relying upon *Askew* v *Hargrave*, 401 US 476 (1971) and *Reetz* v *Bozanich*, 397 US 82, 85 (1970).

The Trial Court's Memorandum Opinion, dated July 12, 1971, held, in significant part:

> "With regard to pre-emption, the Supreme Court in *Swift & Co.* v. *Wickham*, 382 U.S. 111, held that Supremacy Clause cases are not within the purview of a three judge court.

> "With regard to the other issues, the lack of a justiciable controversy precludes entry of this Court into the matter. No prosecution is pending, nor threatened which would realistically infer that plaintiffs in a trial of a case would be denied the benefits of the Due Process and Equal Protection clauses or that a State court would not consider the other constitutional issues with circumspection and thoroughness in the usual and normal course."

The factual findings made by the Trial Court, as a basis for decision, established that:

1. The Michigan legislature, recognizing the need for pollution control devices and systems, has enacted Act 167 of the Public Acts of 1970, commencing its implementation by first enforcing the requirements relating to pleasure craft and then approaching owners and operators of Great Lakes commercial cargo vessels with the sole objective of effecting voluntary compliance within a reasonable time.

2. Total retention holding tanks have been installed on each of the commercial vessels of Ford Motor Company at nominal installation, and pump-out costs per ship, and other total retention systems are being tried aboard other commercial vessels, including four Canadian Registry vessels and the vessels of appellants.

3. Appellees, in seeking the voluntary cooperation of appellants in the implementation of Act 167, supra, have not instigated nor threatened criminal prosecution authorized under Section 11 of the state statute.

4. The injunctive relief initially granted by the Trial Court was sought solely in anticipation that other state governmental units might act, presumably in the imminently near future, and that such action would in fact

conflict with Michigan standards; and that appellants' fear of irreparable injury was merely anticipatory and based solely on speculation.

5. The Wisconsin legislature has introduced legislation regulating sewage discharges from commercial vessels into the waters of that state. In this connection, the Attorney General informs this Court that the Minnesota legislature has recently approved a bill requiring total retention holding tanks for pleasure craft, and that overboard disposal of wastes from such watercraft is now prohibited in Illinois, Indiana, Michigan, Minnesota, New York, Wisconsin and Ontario.

6. The initial standards and regulations of the Federal Water Pollution Control Act, as amended (33 USC Section 1151, et seq), will not become effective for new vessels of appellants for two years after promulgation and, for existing vessels, until five years after promulgation. [Section 1163(c)(1)].

7. Section 13 of the federal statute authorizes application by a state to the Environmental Protection Agency for a regulation prohibiting discharge of *any* sewage into state waters. The Attorney General informs the Court such application has been made by the governor of the State of Michigan under date of June 8, 1971 (Appendix D).

8. Appellants' expressed fear that appellees may administratively interpret Act 167, supra, to require installation of huge holding tanks (40,000 gallons) for all treated materials is without basis for assertion, the Michigan legislature having drawn distinction between prohibited discharges of noxious materials in Section 3(1) of the Act, and the discharge of "sewage," defined in Section 2(d) as ". . . all human wastes, treated or untreated," requiring total retention holding tanks or incinerating

devices for human wastes only, which legislative interpretation has been administratively approved by appellees.

9. That upon the evidence presented, appellants seek merely an advisory opinion of the Trial Court that would bar state action in the field of the Great Lakes pollution until such time as the federal government assumes control, if it does, to prevent the discharge of untreated or inadequately treated sewage into the navigable waters of the Great Lakes.

ARGUMENT

THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT

The central question posed by this litigation is whether the United States government, by enactment of the Federal Water Pollution Control Act, as amended, has the sole authority under the doctrine of pre-emption to regulate the field of pollution control in the waters of the Great Lakes to the exclusion of the State of Michigan.

The doctrine of federal pre-emption has its roots in Article VI, Clause 2 of the United States Constitution, the "Supremacy Clause," which elevates federal law above that of the states. On the other hand, under the 10th Amendment of the federal constitution, "the powers not designated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people."

Thus, in any inquiry into federal pre-emption, it must be initially determined that congressional action establishing federal regulation in a particular field has been undertaken pursuant to one of the powers delegated to the United

States by the Constitution, *Rice* v *Santa Fe Elevator Corp.*, 331 US 218, 229-230 (1947).

Once that issue is ascertained, the crucial question is whether Congress has exercised that power in such manner as to exclude the states from asserting concurrent jurisdiction over the same subject matter.

The key factors in the determination of whether Congress has pre-empted a particular area so as to preclude state attempts at dual regulation include:

1. The aim and intent of Congress as revealed by the statute itself.

2. The pervasiveness of the federal regulatory scheme as authorized and directed by the legislation and as carried into effect by the federal administrative agency.

3. The nature of the subject matter regulated and whether it is one which demands exclusive federal regulation in order to achieve uniformity vital to national interests.

4. Whether, under the circumstances of a particular case, state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

In applying these principles, the standards to be adhered to in determining whether federal pre-emption exists have been clearly stated in *Florida Line & Avocado Growers, Inc.* v *Paul*, 373 US 132, 142 (1963), which states:

"The test of whether both federal and state regulation may operate, or the state regulations must give

way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives.

"The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."

The tests there stated are the appropriate tests to be applied here, since the only significant point of difference asserted is whether Congress has "unmistakably" expressed an intent to pre-empt the field of Great Lakes pollution control.

This Court has uniformly recognized the legitimate interest of the state in its laws designed to protect the health and safety of its citizens and has refused to find federal pre-emption over state health and safety laws, absent a clear and unmistakable showing of an intent on the part of Congress to pre-empt. *Brotherhood of Locomotive Engineers* v *Chicago, Rock Island & Pacific Railroad Co.*, 382 US 423 (1966) (reversing 239 F Supp 1); *Huron Portland Cement Co* v *City of Detroit*, 362 US 440 (1960); *Terminal Railroad Association of St. Louis* v *Brotherhood of Railroad Trainmen*, 318 US 1 (1942) *Reid* v *Colorado*, 187 US 137 (1902).

The state law here under consideration clearly falls in the category of laws designed to protect the health and safety of the citizens of this state.

Obviously, Congress knew how to establish federal pre-

emption in the federal statute by expressly providing therefor in clear language. The Federal Water Pollution Control Act, as amended by the Water Quality Improvement Act of 1970, reflects no clear intent to pre-empt the field involved in this appeal. Indeed, Congress, in addressing itself to water pollution, in the federal statute, 33 USC §1151, stated in Section 1(c):

> "Nothing in this Act shall be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters [including boundary waters] of such States."

Further, Section 1(b) of the Water Pollution Control Act declares that the policy of Congress is "to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution."

Section 10 of the federal statute provides that except where the Attorney General has actually obtained a court order of pollution abatement on behalf of the United States, "State and interstate action to abate pollution of . . . or navigable waters . . . shall not . . . be displaced by federal enforcement action." 33 USC §1160.

The Environmental Quality Improvement Act of April 3, 1970 (84 Stat 114; 42 USC §4371), in stating the general policy of Congress in protecting the environment, also states "The primary responsibility for implementing this policy rests with State and local governments." 42 USC §4371(b)(2).

It is thus clear that the Federal Water Pollution Control Act, as amended, has not signified a congressional intention to pre-empt concurrent state control of the discharge of untreated, or inadequately treated, sewage into

the navigable waters of the Great Lakes, and its connecting waterways.

Appellees have conceded that federal pre-emption will take place when the initial standards and regulations federally promulgated become effective (For new vessels, two years after promulgation, and for existing vessels, five years after promulgation).

The Environmental Protection Agency has declared "Holding tanks and other devices which preclude any discharge are presently on the market and are capable of providing compliance with the standards" and "appropriate flow through devices meeting this standard may not have yet been developed for certain classes of vessels covered by the proposed regulation," and "that until such effective dates, the States have the authority to adopt and enforce their own statutes and regulations on this subject without federal participation." (18 CFR, Part 640, May 12, 1971; Appendix E).

Consequently, there exists no legal basis for concluding that the subject matter sought to be regulated by Michigan is one presently demanding "exclusive federal regulation . . . to achieve uniformity vital to the national interests," or that the state statute represents an obstacle to the accomplishment and execution of the purposes and objectives declared by Congress, as carried into effect by the Environmental Protection Agency. Nor does there exist technological obstacles, unrelated to the corporate attitudes of appellants, which would make installation of holding tanks and devices contemplated by the state statute unfeasible.

Neither is a need for "national uniformity" established by appellants by reason of federal licensing of their vessels. Appellants' Jurisdictional Statement (page 18)

therefore fails to support the conclusion that states may not impose a requirement that federally licensed vessels install pollution equipment.

This Court has unequivocally ruled that federal ship inspection standards, or mere possession of a federal license, does not immunize appellants from the operation of normal incidents of state police power and, further, that state requirements so imposed do not unduly burden these licensees, or otherwise impose such restraint as to be constitutionally invalid. *Huron Portland Cement Company* v *City of Detroit,* 362 US 440; 4 L Ed (2d) 852, 858-859; 80 S Ct 813 (1960).

Also present here is a separate and distinct issue, namely, the doctrine of abstention. The sensitive nature of our system which involves both State and National interests has produced a long standing public policy against federal court interference with state court proceedings. See, *Fenner* v *Boykin,* 271 US 240 (1926); *Younger* v. *Harris,* 401 US 37 (1971). An exception to this policy, however, was recognized in *Dombrowski* v *Pfister,* 380 US 479 (1965), where a complainant alleged misuse of state law to harass him and to discourage his supporters from asserting their constitutional rights.

This Court has reviewed the impact of *Dombrowski* recently in several cases. In *Younger* v. *Harris,* 401 US 37 (1971), for instance an action was brought in federal court to enjoin prosecution under a State Syndicalism Act alleging that the prosecution and the statute had a "chilling effect" upon the exercise of free speech rights. This Court held in *Younger* that the *Dombrowski* exception was quite narrow and that federal courts should not enjoin state proceedings unless " 'great and immediate' irreparable injury" is established.

Similarly, in *Samuels* v. *Mackel,* 401 US 66 (1971), an action was brought in federal court seeking a declaratory judgment holding a state criminal anarchy statute unconstitutional. This Court held that the standards as expressed in *Younger* v. *Harris,* 401 US 37 (1971), apply even though declaratory relief rather than injunctive relief was involved. The policy and rule of *Younger* and *Samuels* read together was succintly stated by this Court to be as follows:

> "As our holdings today in *Younger* v. *Harris, ante,* and *Samuels* v. *Mackell, ante,* show, the normal course of state criminal prosecutions cannot be disrupted or blocked on the basis of charges which in the last analysis amount to nothing more than speculation about the future. The policy of a century and a half against interference by the federal courts with state law enforcement is not to be set aside on such flimsy allegations as those relied upon here." *Boyle* v. *Landry,* 401 US 77, 81 (1971).

In the instant case, appellants seek to raise the constitutional validity of a Michigan criminal statute in federal court. There is no establishment by the appellants, however, of great and immediate irreparable harm as is required for federal court intervention under the *Younger* and *Samuels* reasoning. At best, appellants seek to block a state criminal law statute on "nothing more than speculation about the future."

Additionally, this Court has consistently applied the concept that "proper exercise of federal jurisdiction requires that controversies involving unsettled questions of state law be decided in the state tribunals preliminary to a federal court's consideration of the underlying federal constitutional issues." *City of Meridian* v. *Southern Bell Telephone and Telegraph Co.,* 358 US 639, 640-641, 3 L-Ed

2d 562, 563, 79 S Ct 455 (1959); *Fornaris* v. *Ridge Tool Co.*, 27 L Ed 2d 174, 91 S Ct 156 (1970); *Reetz* v. *Bozanich*, 397 US 82, 86, 25 L Ed 2d 68, 72, 90 S Ct 788 (1970). It cannot be denied that Act 167 of the Public Acts of 1970, State of Michigan, involves unsettled questions of State law.

The justifiable reluctance of this Court to exercise jurisdiction over complex, scientific issues in pollution cases of this nature, not calling for resolution of important problems of federal law, was recognized also in *State of Ohio* v. *Wyandotte Chemical Corporation*, 28 L Ed 2d 256 (1971).

In the light of these sound and persuasive authorities, it is respectfully submitted there exist compelling reasons for invocation of the doctrine of abstention here.

The appellants also urge that the Michigan statute (a) denies due process and equal protection of the laws and (b) imposes an undue burden on interstate commerce. The evidence presented to the Trial Court established that the burdens, if any, of statutory compliance rest equally upon recreational watercraft and commercial carriers and, further, that interstate carriers of the class represented by appellants have voluntarily complied with the state statute.

This Court in *Morey v. Doud*, 354 US 457, 463, 77 S Ct 1344, 1 L Ed 2d 1485, 1490 (1957) has stated the established principle that the "prohibition of the Equal Protection Clause goes no further than the invidious discrimination." In *Williams* v *Lee Optical Company*, 348 US 483, 488 (1955), this Court further ruled that "the day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions." Justice Potter Stewart, in *Huron Portland Cement Company* v *City of Detroit, supra*, has recognized "that legislation designed to free from pollution the very air that people breathe

clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power." More recently this Court, in *Pike* v *Church*, 397 US 137 (1970), has held that where a state statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burdens imposed on such commerce are clearly excessive in relation to the local benefits conferred.

The commerce clause does not, by itself, exclude the states from legislating on matters relating to the health, life and safety of their citizens, even though such legislation may materially affect interstate commerce. *Head* v *New Mexico Board of Examiners in Optometry*, 374 US 424, 83 S Ct 1759, 10 L Ed 2d 983 (1963); *Huron Portland Cement Company* v *City of Detroit, supra; Cohen* v *Bredehoeft*, 290 F. Supp 1001, 1003 (1968) affd 402 F 2d 61 (US Dist Ct, Texas).

Nor is this settled principle diluted by ruling of this Court in *Bibb* v *Navajo Freight Lines*, 359 US 520 (1959), as suggested by appellants' Jurisdictional Statement (page 18). The *Bibb* decision was fully considered, and rejected, as a controlling basis for decision by this Court in sustaining the validity of the State of Arkansas "full crew" statutes against challenges made under the commerce clause and the Fourteenth Amendment. *Brotherhood of Locomotive Firemen and Enginemen et al* v *Chicago, Rock Island and Pacific Railroad Company, et al*, 393 US 129, 21 L Ed 2d 289, 89 S Ct 323, reh den 393 US 1045 (1968).

One of the most important duties of state government is protection of the public health, safety and welfare. *Johnson et al* v *Genesee County, Michigan, et al* 232 F Supp 567, 571 (1964). Legislation fulfilling that duty clearly falls within the state's police power and is not

violative of the Fourteenth Amendment so long as there is a real and substantial relationship, plainly present here, between the statute and the purpose of protecting the health, safety and welfare.

Measured by these standards, Act 167 of the Public Acts of 1970, State of Michigan, is valid and constitutional in all respects.

Appellants' final argument urges that the statutory language of Section 3, Act 167 of the Public Acts of 1970, State of Michigan, is so vague as to be incapable of enforcement. Specifically, appellants challenge the meaning of the term "detrimental to the public health and welfare," as employed in Subdivision 1, Section 3. Appellants have not cited a single authority to the Trial Court in support of the contention. The legislative guide there set forth is preservation of the public health and welfare and, because of varying degrees of pollution which might detrimentally affect the public health of its citizens, the Michigan legislature wisely did not undertake to enumerate them.

In responding to the charge that a penal statute of the Interstate Commerce Commission was unconstitutionally vague, this court in *Boyce Motor Lines Inc.* v *United States of America,* 342 US 337, 340 (1952) noted that statutes must deal with "untold and unforeseen variables in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions."

As Justice Hughes wrote in *Appalachian Coals, Inc. et al* v *United States of America,* 288 US 344, 359-360 (1933), in sustaining the broad language of the Sherman Anti-Trust Act, ". . . It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by provid-

ing loopholes for escape." Of the standards legislatively established, the Court stated the Act's "general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness." Plainly, the Michigan statute here challenged adequately describes a judicially enforceable standard of reasonableness under all tests established by this Court.

Moreover, it is the judicial role to look at the statute as a whole, and the practical context from which it emerges, to determine legislative intention. Once that legislative policy is articulated, it is plainly the Court's role to implement, not frustrate, that policy.

Plainly, the term "public health, safety and welfare" is a familiar legal phrase that has been the subject of public and private nuisance law for centuries, *Renken* v *Harvey Aluminum, Inc.*, 226 F Supp 169, 175-176 (US Dist Ct, Oregon, 1963). Nor can it be denied that pollution of Michigan waters by appellants is a public nuisance. No one would seriously urge that the law of nuisance is constitutionally vague, even though it is manifest that the doctrine necessarily proceeds from broad principles.

The policy behind the Michigan Water Pollution Control Act is well understood. The Michigan legislature has concisely stated its desire that all persons examine with care the cost to society of their activities, and to consider the range of alternatives statutorily provided to protect the public right to environmental quality of Michigan waters.

So tested, it is abundantly clear that Section 3 of the Michigan statute is not unconstitutionally vague, and that the claim of constitutional infirmity alleged by appellants is so unsubstantial as not to warrant further consideration by this Court.

CONCLUSION AND PRAYER

WHEREFORE, appellees respectfully submit that the questions upon which this cause depend are so unsubstantial as not to require further argument, and appellees respectfully moye the Court to dismiss this appeal or, in the alternative, to affirm the judgment of the United States District Court, Eastern District of Michigan, Southern Division.

Respectfully submitted,

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APPENDIX

Appendix A

STATE OF MICHIGAN

ACT 167, PUBLIC ACTS OF 1970

AN ACT to regulate the disposal of oil and sewage from watercraft; and to prohibit littering of waterways.

The People of the State of Michigan enact:

Sec. 1. This act shall be known and may be cited as the "watercraft pollution control act of 1970".

Sec. 2. As used in this act:

(a) "Act" means Act No. 245 of the Public Acts of 1929, as amended, being sections 323.1 to 323.12a of the Compiled Laws of 1948.

(b) "Commission" means the water resources commission of the department of natural resources.

(c) "Litter" means all rubbish, refuse, waste material, garbage, offal, paper, glass, cans, bottles, trash, debris or other foreign substances of every kind and description.

(d) "Sewage" means all human body wastes, treated or untreated.

(e) "Oil" means oil of any kind or in any form, including but not limited to petroleum, fuel oil, sludge and oil refuse.

(f) "Marine toilet" means any toilet on or within a watercraft used to discharge sewage.

(g) "Watercraft" means any contrivance used or capable of being used for navigation upon water, whether or not capable of self-propulsion, including foreign and domestic vessels engaged in commerce upon the waters of this state, passenger or other cargo-carrying vessels and privately owned recreational watercraft.

(h) "Waters of this state" means all of the waterways on which watercraft may be used or operated including, but not limited to, the Great Lakes and connecting waterways under the jurisdiction of this state.

(i) "Person" means an individual, partnership, firm, corporation, association or other entity.

(j) "Discharge" means any spilling, leaking, pumping, pouring, emitting, emptying or dumping.

Sec. 3. (1) A person shall not place, throw, deposit, discharge or cause to be discharged into or onto the waters of this state, any litter, sewage, oil or other liquid or solid materials which render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes.

(2) It is unlawful to discharge, dump, throw or deposit garbage, litter, sewage or oil from a recreational, domestic or foreign watercraft used for pleasure or for the purpose of carrying passengers, cargo or otherwise engaged in commerce on the waters of this state.

Sec. 4. (1) Any pleasure or recreational watercraft operated on the waters of this state which is moored or registered in another state or jurisdiction, if equipped with a pollution control device approved by that jurisdiction,

may be approved by the commission to operate on the waters of this state.

(2) A person owning, operating or otherwise concerned in the operation, navigation or management of a watercraft having a marine toilet shall not own, use or permit the use of such toilet on the waters of this state unless the toilet is equipped with 1 of the following pollution control devices:

(a) A holding tank or self-contained marine toilet which will retain all sewage produced on the watercraft for subsequent disposal at approved dockside or onshore collection and treatment facilities.

(b) An incinerating device which will reduce to ash all sewage produced on the watercraft. The ash shall be disposed of onshore in a manner which will preclude pollution.

Sec. 5. All marinas operating on the bottomlands of the Great Lakes under lease from the department of natural resources under Act No. 247 of the Public Acts of 1955, as amended, being sections 322.701 to 322.715 of the Compiled Laws of 1948 and all those operating on the bottomlands of inland lakes and streams under permit from the department of natural resources under Act No. 291 of the Public Acts of 1965, as amended, being sections 281.731 to 281.752 of the Compiled Laws of 1948 if selling marine fuel or otherwise providing a dockside service center shall provide pump-out facilities approved by the department of public health for marine toilet holding tanks on pleasure watercraft. Failure to comply with the provisions of this section by any marina owner or operator is just cause for revoking the permit or prohibiting the issuance of a lease for the use of the state's bottomlands. The owner or operator of a marina shall be given written notice and opportunity of hearing before any action is taken.

Sec. 5a. All marinas owned and/or operated or leased by the Michigan waterways commission shall by July, 1971 provide pump-out facilities approved by the department of public health for marine toilet holding tanks or pleasure and commercial watercraft.

Sec. 5b. Any marina or dock which is equipped to handle watercraft of the size capable of being equipped with a marine toilet, owner, leased or operated by the state, any of its departments or agencies or any local unit of government shall maintain a pumping station for pumping out the holding tank required on watercraft.

Sec. 5c. Any marina or dock that holds 15 watercraft or less is exempt from section 5 of this act.

Sec. 6. An applicant for a boat plate registration for a watercraft pursuant to section 1a of Act No. 70 of the Public Acts of 1911, as amended, being section 207.51a of the Compiled Laws of 1948 shall disclose at such time to the commission whether the watercraft has in or on it a marine toilet, and if so, whether the toilet is equipped with a pollution control device as required by this act. The commission may request the secretary of state to provide it with the name of registrant whose registration indicates the absence of such pollution control device on a marine toilet.

Sec. 7. (1) A person owning, operating or otherwise concerned in the operation, navigation or management of a watercraft operating on the waters of this state shall not discharge or permit the discharge of oil or oily wastes from the watercraft into or onto the waters of this state if the oil or oily wastes threaten to pollute or contribute to the pollution of the waters or adjoining shorelines or beaches.

(2) The owner or operator of any watercraft who, whether directly or through any person concerned in the operation, navigation or management of the watercraft, discharges or permits or causes or contributes to the discharge of oil or oily wastes into or onto the waters of this state or adjoining shorelines or beaches shall immediately remove the oil or oily wastes from the waters, shorelines or beaches. If the state removes the oil or oily wastes which were discharged by an owner or operator, the watercraft and the owner or operator are liable to the state for the full amount of the costs reasonably incurred for its removal. The state may bring action against the owner or operator to recover such costs in any court of competent jurisdiction.

Sec. 8. All watercraft moored, operated or located upon the waters of this state are subject to inspection by the commission, any lawfully designated agent or inspector thereof or any peace, conservation or police officer for the purpose of determining if the watercraft is equipped in compliance with the requirements of this act. The commission may inspect marinas and other waterside facilities used by watercraft for launching, docking or mooring purposes to determine if they are equipped with trash receptacles, sewage disposal equipment or both. Commercial docks and wharfs designed for receiving and loading cargo and/or freight from commercial watercraft must furnish facilities, if determined necessary, as prescribed by the commission, to accommodate discharge of sewage from heads and galleys, and for deposit of litter, garbage, trash, or bilge waters from the watercraft which utilize the docks or wharfs.

Sec. 9. The state fully reserves to itself the exclusive right to establish requirements with reference to the disposal or discharge of sewage, litter and oil from all water-

craft. In order to assure statewide uniformity, the regulation by any political subdivision of the state of waste disposal from watercraft is prohibited.

Sec. 10. The commission may promulgate all rules necessary or convenient for the carrying out of duties and powers conferred by this act.

Sec. 11. Any person who violates any provision of this act is guilty of a misdemeanor and shall be fined not more than $500.00. To be enforceable, the provision or the rule shall be of such flexibility that a watercraft owner, in carrying out the provision or rule, is able to maintain maritime safety requirements and comply with the federal marine and navigation laws and regulations.

Sec. 12. This act shall take effect January 1, 1971.

This act is ordered to take immediate effect.

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LAKE CARRIERS' ASSOCIATION and AMERICAN STEAMSHIP COMPANY, et al., Plaintiffs, vs. RALPH A. MacMULLAN, et al., Defendants.	CIVIL ACTION No. 36194

MEMORANDUM OPINION

Before EDWARDS, Circuit Judge, and KEITH and PRATT, District Judges.

PRATT, District Judge:

Plaintiffs in this proceeding are the Lake Carriers' Association and 19 of its 21 member companies who own and operate Great Lakes cargo vessels. Defendants are the Attorney General of the State of Michigan, the Michigan Department of Natural Resources and its Director and the Michigan Water Resources Commission and its Executive Secretary.

The complaint seeks a declaratory judgment holding that the Michigan Water Pollution Act of 1970 (Act 167 of Public Acts of 1970) is constitutionally infirm and conflicts with federal legislation, and correspondingly, re-

quests that the State of Michigan be enjoined from enforcing that Act.

A three judge Court was convened pursuant to Section 2284 of Title 28 of the United States Code and a hearing was conducted on April 26 and 27, 1971.

The plaintiffs present five major issues as the basis for relief:

1. That the federal government has pre-empted the field of pollution control in the waters of the Great Lakes and that the Michigan Water Pollution Act conflicts with a federal statute, specifically (Water Pollution Control Act as amended by the Water Quality Improvement Act of 1970, 33 U.S.C. Sec. 1151 et seq.); the said federal statute manifests the intention of the federal government to occupy the field exclusively; and that federal vessel inspection laws, administered by the U. S. Coast Guard, preclude state prescription of shipboard equipment.

2. That the Michigan Water Pollution Act places an undue burden on interstate commerce.

3. That the Michigan Water Pollution Act interferes materially with uniform maritime law.

4. That the Michigan Water Pollution Act denies plaintiffs due process and the equal protection of the laws.

5. That the language and provisions of the Michigan Water Pollution Act are unconstitutionally vague and, thus, unenforceable.

Great Lakes shipping can be characterized as a large, vital and sophisticated industry. It traverses all of the Great Lakes, the connecting waterways and tributaries

and touches upon the states of Minnesota, Wisconsin, Illinois, Indiana, Michigan, Ohio, Pennsylvania and New York and the Canadian provinces of Ontario and Quebec. The advent of the St. Lawrence Seaway System provides an international flavor to shipping on the Great Lakes.

As an example of the size and scope of the industry, as of January 1, 1970, there were a total of 442 vessels in excess of 1,000 tons on the Great Lakes. Of this total, 263 were vessels of United States Registry, having a combined tonnage of 1,802,776 gross tons, and 179 were vessels of Canadian Registry having a combined tonnage of 1,576,165 gross tons. Flow charts indicate that the total commerce of the lakes in 1964 was 210,830,576 short tons with the primary commodities being iron ore, coal, grain, stone, petroleum, cement and sand and gravel. Of this commerce, about one-third (approximately 72 million short tons) utilizes or touches Michigan ports. A resume of trade patterns and courses shows that Great Lakes cargo vessels cross and criss-cross during the shipping season from a great variety of ports within the Great Lakes waterway system, and may enter a particular state's waters frequently without touching at a port in that state. Generally, if recommended navigational courses are followed, the vessels do not, while traversing open waters come within three miles of land except when entering or leaving a port or when in a connecting waterway.

A typical or average Great Lakes cargo vessel would be between 500 and 600 feet in length, have a gross tonnage of 7,500 tons and a carrying capacity of 12,000 gross tons. It is a flat-decked vessel except for the "houses" fore and aft where are located the crew quarters, machinery, supplies, navigational and other equipment necessary to the operation of the vessel. The center length of the vessel is devoted to cargo. Crew sizes range from 30 to 35 men

per vessel and it is estimated each man daily generates 125 gallons of liquid waste (including wash and bathing water and sanitary flush water).

Recognizing the need for pollution control devices and systems, a part at least of the Great Lakes shipping industry has taken some steps in the direction of reducing the discharge of pollutants. Approximately 30 ships have installed a macerating-chlorinating system and another 26 (including four Canadian registry vessels) have installed biogest systems. Other systems are also being tried empirically aboard some vessels, and are of the incinerating or of the "package-treatment plant" type.

It is within the foregoing context that the State of Michigan enacted the Water Pollution Control Act of 1970, and began its implementation by, first, enforcing the requirements relating to pleasure craft and then by approaching the owners and operators of Great Lakes cargo vessels in order to obtain compliance with the provisions of the Act.

The Water Pollution Control Act of 1970, (a copy of which is attached hereto as Appendix A) as particularly pertinent here, provides that:

> Sec. 3. (1) A person shall not place, throw, deposit, discharge or cause to be discharged into or onto the waters of this state, any litter, sewage, oil or other liquid or solid materials which render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes.

and,

> Sec. 4. (2) A person owning, operating or other-

wise concerned in the operation, navigation or management of a watercraft having a marine toilet shall not own, use or permit the use of such toilet on the waters of this state unless the toilet is equipped with 1 of the following pollution control devices:

(a) A holding tank or self-contained marine toilet which will retain all sewage produced on the watercraft for subsequent disposal at approved dockside or onshore collection and treatment facilities.

(b) An incinerating device which will reduce to ash all sewage produced on the watercraft. The ash shall be disposed of onshore in a manner which will preclude pollution.

Sec. 11. Any person who violates any provision of this act is guilty of a misdemeanor and shall be fined not more than $500.00. To be enforceable, the provision or the rule shall be of such flexibility that a watercraft owner, in carrying out the provision or rule, is able to maintain maritime safety requirements and comply with the federal marine and navigation laws and regulations.

From the above provisions, it appears that the legislature of the State of Michigan sought to draw a distinction between the discharge of "noxious" materials and the discharge of "sewage" (defined in Section 2(d) as ". . . all human body wastes, treated or untreated."), in the latter instance requiring either a holding tank or an incinerating device, whereas in the former the prohibition does not proscribe the discharge of "treated" materials.

As a result of the overtures of state officials, with the aim of establishing voluntary compliance within a reasonable time, some ship owners have installed holding tanks

to control sewage discharge; for example, Ford Motor Company has installed two 1,000 gallon holding tanks on each of its six vessels at a cost of approximately $20,000.00 per vessel. The Ford vessels' holding tanks are pumped out at the Ford dock when the ships return to their port by the utilization of septic tank pump-out trucks at a cost of between $50.00 and $70.00 per ship.

The latter finding points up a significant feature, that is, that Michigan has, as yet, provided no pump-out facilities at any of its ports, although it is anticipated that arrangements with municipal authorities or others (including dock owners and ship owners or operators with their own docks) will establish a network of such facilities.

Against this background is superimposed the entry of the federal government by virtue of the Water Quality Improvement Act of 1970, supra, which has as one of its major purposes pollution control of navigable waters, including the Great Lakes system.

In paraphrase, the federal Act provides that as soon as possible after April 3, 1970, the Secretary of Interior shall promulgate federal standards of performance for marine sanitation devices which shall be designated to prevent the discharge of untreated or inadequately treated sewage into or upon the navigable waters of the United States. (Section 1163 (b) (1).) The Act also provides that initial standards and regulations shall become effective for new vessels two years after promulgation and for existing vessels five years after promulgation. (Section 1163 (c)(1).) Subsection (f) of Section 1163 prohibits any state from enforcing any statute or regulation with respect to the design, manufacture, or installation or use of any marine sanitation device on any vessel subject to the section after the effective date of the initial standards and regulations promulgated under the section. A state

may, however, apply to the Secretary for a regulation prohibiting the discharge of *any* sewage into the waters of that state. (Emphasis supplied.)

There is no dispute that the vessels and waters covered by the Federal Act are the same vessels and waters which are the subject matter of this case. The cause of plaintiffs' anxiety and apprehension is not, however, limited to the alleged conflict between the Federal Act and the Michigan Act. For example, pollution control of the waters of the Great Lakes has been a matter of discussion between the governments of the United States and Canada and specific reference has been made to the problem of achieving compatible regulations governing waste disposal by commercial vessels. (Ex. 23, Communique of the Canada/United States Ministerial Meeting on Great Lakes Pollution, June 23, 1970); the Canadian government has circularized to the shipping industry proposed regulations governing sewage and garbage disposal on the Great Lakes waters within its boundaries (Ex. 22); in early 1968, Federal authorities met with representatives of Lake Michigan states regarding pollution control of that Lake and it was there recognized that sewage disposal directly into Lake Michigan waters was a distinct threat to the quality of the Lake, Ex. 21); a bill has been introduced into the Wisconsin legislature which purports to regulate sewage discharge from commercial vessels into the waters of that state (Exhibit D).

Adding to the uncertainties created by the foregoing is the expressed fear of the plaintiffs that Michigan may, administratively or judicially, interpret its statutes to require that Great Lakes vessels install huge holding tanks of a capacity (40,000 gallons) that would retain for eventual pumping out *all* materials, fluids and substances generated by and on a vessel.

Inherent, then, in this situation, assert the plaintiffs, is the real possibility that each of the governmental units involved, if left to, their own devices, would promulgate different, conflicting standards, prohibitively costly and structurally dangerous and, presumably, each statute with a criminal penalty.

But with a recitation of what is, should be coupled a recitation of what is not. In that balance sheet lies the real crux of the issues presented and the role of this Court.

The pollution of our environment has become a major problem of our society. There is hardly an industry, a governmental unit, a citizens' organization—nor even a person—who is not daily confronted with dire warnings regarding the danger confronting our ecology if corrective and reparative steps are not taken immediately. There are few dissenters and conflicts appear to arise only as to timetables, methods and expense. Investigations, studies, reports, surveys and conferences abound.

Michigan has chosen to promulgate a program, which is original within the Great Lakes region as it respects lakes pollution. No other state, province or national government has, as yet, instituted a Great Lakes pollution control program although certainly each is involved and concerned. The significant factor is, however, that the plaintiffs here request relief on the basis of an *anticipation* that other governmental units will act, presumably in the imminently near future and that such action will in fact conflict with Michigan standards.

Further, although the plaintiffs asserted that the Michigan statute might or could be interpreted to require holding tanks of 40,000 gallon capacity, there is no substantial grounds for that assertion, particularly in view of the stated position of Michigan authorities that the holding

tank provision is aimed at the elimination of the practice of discharging *human wastes* into Michigan waters.

Primary in the factual picture and, therefore, paramount in the Court's consideration, is the attitude of Michigan authorities who seek the cooperation of the industry in the implementation of its program and have not instigated, nor does it appear, threatened criminal prosecutions.

It is this consideration that gives us the starting point of our discussion of the issues.

Wilson v. *Schnettler,* 365 U.S. 381, provides a succinct guideline regarding the role of the federal courts vis a vis state courts, when Justice Whittaker wrote (at page 385):

> There is still another cardinal reason why it was proper for the District Court to dismiss the complaint. We live in the jurisdiction of two sovereignties. Each has its own system of courts to interpret and enforce its laws, although in common territory. These courts could not perform their respective functions without embarrassing conflicts unless rules were adopted to avoid them. Such rules have been adopted. One of them is that an accused "should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial." *Ponzi* v. *Fessenden,* 258 U.S. 254, 260. Another is that federal courts should not exercise their discretionary power "to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent . . . . ." *Douglas* v. *City of Jeannette, supra,* at 163.

A later exposition of the principle is contained in *Dombrowski* v. *Pfister,* 380 U.S. 479, where it was said (pages 484, 485):

> ". . . . considerations of federalism have tempered the exercise of equitable power, for the Court has recognized that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework. It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings."

The impact of *Wilson* and *Dombrowski* is a pervading one, particularly, as here, where dealing as we are with a penal statute, prosecution has not been instituted and threatened prosecution does not appear imminent. (See *Doe* v. *Randall,* 314 F. Supp. 32, D. Minnesota, aff'd *Hodgson* v. *Randall,* 39 L.W. 3505.)

Nor is there any intimation that the "necessary operation" of state court machinery would prevent a fair trial.

On the contrary, there is every reason to believe that the Michigan court system, with its declaratory judgment procedures (Michigan Court Rules, GCR 1963, Section 521) provide full and adequate machinery to insure a fair hearing of plaintiffs' cause. More importantly, there is every reason to believe that the Michigan courts are eminently qualified to apply constitutional standards studiously and assiduously in their determinations regarding the validity of state statutes.

Reviewing the issues framed previously, there appears to this Court to be compelling reasons to abstain from consideration of the matter in its present posture.

With regard to pre-emption, the Supreme Court in *Swift & Co.* v. *Wickham,* 382 U.S. 111, held that Supremacy Clause cases are not within the purview of a three judge court.

With regard to the other issues, the lack of a justiciable controversy precludes entry of this Court into the matter. No prosecution is pending, nor threatened which would realistically infer that plaintiffs in a trial of a case would be denied the benefits of the Due Process and Equal Protection clauses or that a State court would not consider the other constitutional issues with circumspection and thoroughness in the usual and normal course.

An overview of the factual situation presented by the evidence in this case compels but one conclusion: that the plaintiffs here are seeking an advisory opinion that would have the effect of prohibiting any state action in the field of Great Lakes water pollution until such time as the federal government manifests its intention and takes control. This the Court declines to do, especially upon reflection of the clear direction given by the Supreme Court in *Public Service Commission of Utah, et al.,* v. *Wycoff Company, Inc.,* 344 U.S. 237, which involved an interestingly similar situation.

Summarizing the case before it, the Supreme Court said (page 245):

> "In the first place, this dispute has not matured to a point where we can see what, if any, concrete controversy will develop. It is much like asking a declaration that the State has no power to enact legislation

that may be under consideration but has not yet shaped up into an enactment."

And went on to say, (pages 247, 248):

"Declaratory proceedings in the ~~federal~~ courts against state officials must be decided with regard for the implications of our federal system. State administrative bodies have the initial right to reduce the general policies of state regulatory statutes into concrete orders and the primary right to take evidence and make findings of fact. It is the state courts which have the first and the last word as to the meaning of state statutes and whether a particular order is within the legislative terms of reference so as to make it the action of the State. We have disapproved anticipatory declarations as to state regulatory statutes, even where the case originated in and was entertained by courts of the State affected. *Alabama State Federation of Labor* v. *McAdory,* 325 U.S. 450. Anticipatory judgment by a federal court to frustrate action by a state agency is even less tolerable to our federalism. Is the declaration contemplated here to be *res judicata,* so that the Commission cannot hear evidence and decide any matter for itself? If so, the federal court has virtually lifted the case out of the State Commission before it could be heard. If not, the federal judgment serves no useful purpose as a final determination of rights.

The procedures of review usually afford ample protection to a carrier whose federal rights are actually invaded, and there are remedies for threatened irreparable injuries. State courts are bound equally with the federal courts by the Federal Constitution and laws. Ultimate recourse may be had to this Court by certiorari if a state court has allegedly denied a federal right.

In this case, as in many actions for declaratory judgment, the realistic position of the parties is reversed. The plaintiff is seeking to establish a defense against a cause of action which the declaratory defendant may assert in the Utah courts. Respondent here has sought to ward off possible action of the petitioners by seeking a declaratory judgment to the effect that he will have a good defense when and if that cause of action is asserted. Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action. Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law. *Tennessee* v. *Union & Planters' Bank,* 152 U.S. 454; *The Fair* v. *Kohler Die & Specialty Co.,* 228 U.S. 22; *Taylor* v. *Anderson,* 234 U.S. 74."

For the foregoing reasons, this Court will abstain from further consideration of the matter.

The Court is mindful of the recent action of the Environmental Protection Agency which on May 12, 1971, published a "Notice of Proposed Rule Making". The Notice an-

nounces that the Agency proposed to amend 18 CFR Part 640 by the promulgation of marine sanitation standards which would permit the use of described treatment devices. Holding tanks or incinerating devices are not required under the proposed standards. The Notice also provides that interested persons may submit views, comments and recommendations concerning the proposed standard to the Agency within 45 days of publication of the Notice.

Defendants have conceded that pre-emption would take place when the initial standards and regulations become effective. Certainly the current action of the Environmental Protection Agency must be carefully considered by the defendants in the interpretation and enforcement of the Michigan statute. This circumstance serves to emphasize the reluctance and declination of the Court to intrude into a matter which is yet unformed.

The temporary restraining order heretofore entered is dissolved and the complaint dismissed without prejudice to plaintiffs to institute other appropriate judicial proceedings.

GEORGE C. EDWARDS, JR. /s/
George C. Edwards, Jr.
United States Circuit Judge

DAMON J. KEITH /s/
Damon J. Keith
United States District Judge

PHILIP PRATT /s/
Philip Pratt
United States District Judge

Dated: July 12, 1971.

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LAKE CARRIERS' ASSOCIATION and AMERICAN STEAMSHIP COMPANY, et al., Plaintiffs, vs. RALPH A. MacMULLAN, et al., Defendants.	CIVIL ACTION NO. 36194

OPINION AND ORDER

Before EDWARDS, Circuit Judge, and KEITH and PRATT, District Judges.

PRATT, District Judge.

Plaintiffs in this proceeding have filed a motion requesting a continuation of the temporary restraining order entered prior to the hearing in this cause or other similar injunctive relief to prevent enforcement by the State of Michigan of Act 167, Public Acts of 1970, pending an appellate court ruling on this Court's opinion and order of July 12, 1971. The effect of the July 12, 1971 order was to dissolve the pre-existing temporary restraining order and dismiss the action.

Plaintiffs' motion was accompanied by an extensive brief as was defendants' response in opposition to the motion.

By agreement of the parties, the motion will be considered on the briefs without oral argument.

The authority of this Court to grant an injunction is not questioned. It continues throughout the period of appeal. Federal Rules of Civil Procedure Rule 62(c), 28 U.S.C.; *Newton* v. *Consolidated Gas Company,* 258 U.S. 165, 177 (1922); *United States* v. *El-O-Pathic Pharmacy,* 192 F.2d 62, 79 (C.A. Cal. 1951).

However, the Rule provides that the decision to grant an injunction is a matter within the discretion of the Court. It is, therefore, incumbent upon plaintiffs to establish that immediate and irreparable injury will result if injunctive relief is withheld. This plaintiffs have not done.

This Court's earlier opinion indicated that an injunction from a federal court suspending the possible enforcement of the Michigan statute was inappropriate until the statute had been interpreted by a Michigan Court. Thus this Court dissolved the existing temporary restraining order, dismissed the action, and abstained from further determinations. This holding is strengthened by the recent decision of *Askew* v. *Hargrave,* 401 U.S. 476 (1971) which strongly endorsed the abstention guidelines of *Reetz* v. *Bozanich,* 397 U.S. 82, 85 (1970).

Moreover, plaintiffs have indicated no change in the facts of this case nor the attitudes of those Michigan officials charged with enforcing the statute in question that would indicate a threat of immediate and irreparable harm to plaintiffs. In their response to the motion, defendants have again indicated that the State of Michigan hopes to obtain compliance with its water pollution standards without resort to criminal prosecution. To enjoin the enforcement of a statute under which prosecution is neither pending nor foreseeable would be an idle gesture.

For the reasons given, plaintiffs' motion must be DENIED. IT IS SO ORDERED.

GEORGE C. EDWARDS, JR. /s/
George C. Edwards, Jr.
United States Circuit Judge

DAMON J. KEITH /s/
Damon J. Keith
United States District Judge

PHILIP PRATT /s/
Philip Pratt
United States District Judge

Dated: September 15, 1971.

U. S. District Court
Eastern District of Mich. } ss

I hereby certify that the foregoing is a true copy of the original on file in this court and cause.

FREDERICK W. JOHNSON, Clerk
By ?????? ?? _____
Deputy Clerk

Dated:

Appendix D

STATE OF MICHIGAN

Office of the Governor

LANSING

WILLIAM G. MILLIKEN
Governor

June 8, 1971

Mr. William D. Ruckelshaus
Administrator
Environmental Protection Agency
1129 20th Street, N.W.
Washington, D. C. 20460

Dear Mr. Ruckelshaus:

The State of Michigan, through this correspondence, hereby requests the Administrator of the Environmental Protection Agency to issue a regulation completely prohibiting the discharge from all vessels of any sewage, whether treated or not, into Michigan's portion of the Great Lakes Erie, Huron, Michigan, Superior, the connecting channels thereof and all other Michigan waters subject to Section 13 of the Federal Water Pollution Control Act.

All Michigan Great Lakes interstate waters are protected for domestic water supply use except the lower Detroit River, and they are also protected for total body contact recreation except at the mouths of major river tributaries and in the immediate vicinity of wastewater treatment plant outfalls. These standards and exceptions, which have been approved by EPA and are joint state-federal standards, can only be assured by careful regulation of waste collection and treatment systems, including the proper location of the fixed point of discharge of the treated effluent.

Mechanical flow-through treatment devices and facilities, even with the best operation and maintenance, are subject to periodic upsets, breakdowns and malfunctions. It is reasonable to expect that flow-through treatment devices on board watercraft and vessels will be subject to even greater operational problems than those land-based facilities under the superintendence of skilled, state-certified municipal and industrial waste treatment plant operators.

The State of Michigan requests your early issuance of a "no sewage discharge" regulation for all Michigan waters, in order that the people of our state can be guaranteed the high quality water now being enhanced and maintained under this state's current water pollution control program.

Sincerely,

WILLIAM G. MILLIKEN /s/
Governor

Appendix E

FEDERAL REGISTER
PROPOSED RULE MAKING 8739

WEDNESDAY, MAY 12, 1971
WASHINGTON, D.C.

Volume 36 — Number 92

ENVIRONMENTAL PROTECTION AGENCY

[18 CFR Part 640]

STANDARDS OF PERFORMANCE FOR MARINE SANITATION DEVICES

Notice of Proposed Rule Making

Notice is hereby given that the Administrator of the Environmental Protection Agency proposes to amend Chapter V of Title 18, Code of Federal Regulations, by adding a new Part 640, as set forth below.

The proposed regulation would promulgate Federal standards of performance for marine sanitation devices. Section 13 of the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1163, directs the Secretary of the Interior to promulgate Federal standards of performance for marine sanitation devices. The authority and functions of the Secretary of the Interior under section 13 were transferred to the Administrator of the Environmental Protection Agency by Reorganization Plan No. 3 of 1970. The proposed regulation was formulated after consultation with the Department of Transportation and after consideration of the economic costs involved and the limits of available technology.

The proposed regulation would require marine sanitation devices to provide a high level of treatment which will be approximately the equivalent of the secondary treatment standards for municipal waste facilities. Such regulation would meet the standards specified in § 640.2, for any sewage permitted to flow through.

It is recognized that appropriate flow-through devices meeting this standard may not have yet been developed for certain smaller classes of vessels covered by the proposed regulation. However, it is believed that the development of such devices prior to the effective date of the standards is within the limits of available technology. Accordingly, the performance standards proposed herein are considered to be practicable and reasonable. Holding tanks and other devices which preclude any discharge are presently on the market and are capable of providing compliance with the standards.

Under section 13(b)(1) of the Federal Water Pollution Control Act, as amended, the Secretary of Transportation has the responsibility to promulgate regulations, consistent with the standards adopted by the Administrator, governing the design, construction, installation, and operation of marine sanitation devices. In this connection, section 13(c)(2) permits the Secretary of Transportation, after consultation with the Administrator, to distinguish among classes, types, and sizes of vessels as well as between new and existing vessels, and to waive applicability of standards and regulations as necessary or appropriate for such classes, types, and sizes of vessels. The Administrator will continue to cooperate and consult with the Secretary of Transportation in connection with the discharge of the Secretary's responsibilities under section 13.

Initial standards and regulations promulgated under section 13 preempt any statute or regulation of a State or

political subdivision with respect to the design, manufacture, or installation or use of any marine sanitation device on any vessel subject to section 13. However, such preemption does not take place until the effective date of the initial standards and regulations. The initial standards and regulations become effective for new vessels two years after promulgation, and for existing vessels five years after promulgation.

Under section 13(f) of the Act, any State may apply to the Administrator for issuance of a regulation prohibiting the discharge from a vessel of any sewage (whether treated or not) into certain delineated areas of waters of the State, and the Administrator shall issue such regulation where he determines that any applicable water quality standards require such prohibition. Examples of such areas which may require the issuance of such regulations could include known shellfish grounds, enclosed inland lakes, areas adjacent to or located in boating marinas, areas adjacent to public beaches, and certain critical waters in the Great Lakes States. The Administrator will welcome such applications and will consider them with dispatch. No-discharge regulations issued by the Administrator will become effective no sooner than the effective dates of the initial standards and regulations issued under section 13(b). Until such dates, the States have the authority to adopt and enforce their own statutes or regulations on this subject wihout Federal participation.

Interested persons are invited to submit, in triplicate, their written views, comments, and recommendations concerning the proposed standards to the Administrator, Environmental Protection Agency, 1626 K Street NW., Washington, D.C. All relevant material received not later than 45 days after publication of this notice will be considered.

WILLIAM D. RUCKELSHAUS,
Administrator.

Dated: May 8, 1971.

PART 640—MARINE SANITATION DEVICE STANDARDS

Sec.
640.1 Definitions.
640.2 Standards.
640.3 Complete prohibition.
640.4 Analytical procedure.

Authority: The provisions of this Part 640 are issued under section 13, 70 Stat. 506, as amended, 33 U.S.C. 1163. Interpret or apply section (b)(1), 84 Stat. 100, 33 U.S.C. 1163(b)(1).

§ 640.1 Definitions.

For the purpose of these standards the following definitions shall apply:

(a) "Sewage" means human body wastes and the wastes from toilets and other receptacles intended to receive or retain body wastes;

(b) "Discharge" includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying, or dumping;

(c) "Marine Sanitation Device" includes any equipment for installation on board a vessel and which is designed to receive, retain, treat, or discharge sewage, and any process to treat such sewage;

(d) "Vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on the navigable waters of the United States;

(e) "Biochemical Oxygen Demand (BOD)" means the

oxygen, measured in milligrams per liter, required by bacteria while stabilizing the organic matter in a sample of sewage under aerobic conditions over a period of 5 days at 20° centigrade;

(f) "Coliform Bacteria" means all of the aerobic and facultative anaerobic, gram-negative, non-spore-forming, rod-shaped bacteria that:

(1) In the Tube-Dilution (most probable number) test, ferment lactose with gas formation within 48 hours of incubation at 35° centigrade, or

(2) In the Standard Membrane Filter Technique Test, produce a dark colony of bacteria with a metallic sheen on M-Endo Broth or Agar within 24 hours of incubation at 35° centigrade.

§ 640.2 Standards.

(a) A marine sanitation device which will prevent the discharge of untreated or inadequately treated sewage, and which will be required under these standards, is one which will prevent the discharge of an effluent containing visible floating or settleable solids; and from which the effluent, without dilution other than that normally used for flushing purposes, does not contain:

(1) Total coliform bacteria in excess of 240 per 100 ml.;

(2) Biochemical Oxygen Demand in excess of 100 mg./1; and

(3) Suspended solids in excess of 150 mg./1.

§ 640.3 Complete Prohibition.

A State may make a written application to the Administrator, Environmental Protection Agency, for the issu-

ance of a regulation completely prohibiting the discharge from a vessel of any sewage (whether treated or not) into particular waters of the State, or specified portions thereof. Such application shall specify with particularity the waters, or portions thereof, for which a complete prohibition is desired. The application shall also demonstrate that a complete prohibition is required by applicable water quality standards; and in this connection the application shall include; (a) a statement of the applicable water quality standards, (b) current data as to the condition of the waters or portions thereof which are the subject of the application, and (c) an explanation of the reasons why it is believed that the discharge of sewage from vessels may contribute to a violation of water quality standards in the waters or portions thereof which are the subject of the application. If, on the basis of the State's application and any other information available to him, the Administrator is unable to make a finding that applicable water quality standards require a complete prohibition of any discharge in the waters or portions thereof covered by the application, he shall state the reasons why he cannot make such a finding, and shall deny the application. If the Administrator makes a finding that applicable water quality standards require a complete prohibition of any discharge in all or any part of the waters or portions thereof covered by the State's application, he shall publish such finding together with a notice of proposed rule making, and then shall proceed in accordance with 5 U.S.C. 553. If the Administrator's finding that applicable water quality standards require a complete prohibition covering a more restricted or more expanded area than that applied for by the State, he shall state the reasons why his finding differs in scope from that requested in the State's application. No regulation under this section shall be issued to take effect sooner than the

effective date of the initial standards and regulations issued under section 13(b)(1) of the Act.

§ 640.4 Analytical procedures.

In determining the composition and quality of effluent discharged from marine sanitation devices the procedures contained in the current "Standard Methods for the Examination of Water and Wastewater," or subsequent revisions or amendments thereto, shall be employed.

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WEDNESDAY, MAY 12, 1971

Supreme Court, U.S.
FILED
OCT 27 19
E. ROBERT

In the Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-422.

LAKE CARRIERS' ASSOCIATION and
AMERICAN STEAMSHIP COMPANY, *et al.*,

Appellants,

vs.

RALPH A. MacMULLAN,
Individually and as Director,
Michigan Department of Natural Resources, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION.

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM.

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BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM.

It would appear that Michigan places principal reliance on *Younger v. Harris,* 39 LW 4201, 401 U.S. 37 (1971) and *Samuels v. Mackell,* 39 LW 4211, 401 U.S. 66 (1971), which hold that where criminal proceedings are pending in a State Court neither injunctive relief nor a declaratory judgment is appropriate.

Despite the fact that:

(1) this Court, in *Younger v. Harris, supra,* said "We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun";

(2) Mr. Justice Stewart, with whom Mr. Justice Harlan joined in a concurring opinion, stated "Finally the court today does not resolve the problems involved when a federal court is asked to give injunctive or declaratory relief from *future* state criminal prosecutions"; and

(3) this Court, in *Samuels v. Mackell, supra,* said "We, of course, express no views on the propriety of declaratory relief when no state proceeding is pending at the time the federal suit is begun;"

the State of Michigan now advocates that *because* there are no criminal prosecutions, pending or threatened, injunctive relief and declaratory judgment procedures are not appropriate. If this be the law, then this Court will have as effectively written off the statute books the provisions for declaratory judgments as if they were summarily repealed by Congress.

Great Lakes shipping is a responsible industry fully cognizant of its obligations under law, but it is also entitled to know what that law is. Michigan suggests that the industry should submit to a voluntarily cooperative program without any legal determination as to the validity of Michigan's requirement that federally licensed vessels install holding tanks or incinerating devices. The only other alternative is to submit to criminal prosecutions, with all the public condemnation that entails, in order to obtain an adjudication of legal rights.

Must a responsible industry such as Great Lakes shipping be tarred with the brush of the criminal and stamped with the broad arrow of the convict before it can obtain a judicial determination of its rights as a citizen? We sincerely hope not.

It is noted that the Court, in its recent decisions, has been as careful to specify the issues it is not deciding as it

is to specify the issues it is deciding, yet those undecided issues seem to readily surface, and this is one such case. Two unanswered questions are squarely before the Court. (1) Under what circumstances may the federal courts act when there is no prosecution pending in state courts at the time the federal proceeding is begun, and (2) under what circumstances can a state prescribe shipboard equipment on federally licensed vessels, a question conspicuously avoided in *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440?

We fully appreciate the Court's sensitivity to the legitimate interests of the states, but to quote Judge Learned Hand in *Central Hanover Bank & Trust Co. v. Commissioner of Internal Revenue* (CCA 2), 159 F.2d 167 (1947), "it scarcely helps to give so wide a berth to Charybdis's maw that one is in danger of being impaled upon Scylla's rocks."

Respectfully submitted,

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E. ROBERT SEAVER, CLERK

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Constitution of the United States:

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Other.

The Consideration of Facts in Due Process Cases, 30 Columbia Law Review 360, 362 34

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Webster's Third New International Dictionary, Unabridged, Merriam-Webster, 1966 39

In the Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-422.

LAKE CARRIERS' ASSOCIATION, *et al.*,

Appellants,

vs.

RALPH A. MacMULLAN, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION.

BRIEF ON BEHALF OF APPELLANTS.

OPINION BELOW.

The Memorandum Opinion of the United States District Court for the Eastern District of Michigan, Southern Division, is not reported, but is printed in the Jurisdictional Statement beginning at page 21.

JURISDICTION.

The jurisdiction of the United States Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. § 1253. The judgment of the United States District Court for the Eastern District of Michigan, Southern Division was filed and entered on July 12, 1971. Notice of Appeal was filed on July 29, 1971 and Probable Jurisdiction was noted December 7, 1971.

STATUTES, LAWS AND TREATIES INVOLVED.

Michigan Watercraft Pollution Control Act of 1970 (Act 167 of 1970; C.L. '48 § 323.331; M.S.A. § 353 (201) et seq.); attached as Appendix G to Jurisdictional Statement. The Federal Water Pollution Control Act as amended by the Water Quality Improvement Act of 1970, 33 U.S.C. § 1151, et seq.; the Steamboat Inspection Acts of February 28, 1871 and May 27, 1936, 46 U.S.C. § 361, et seq.; the Boundary Waters Treaty of 1909 between the United States and Canada, 36 Stat. 2448, Treaty Series No. 548; and Article I § 8, cl. 3; Article III § 2, cl. 1; Article VI, cl. 2, Amendment XIV § 1 of the Constitution of the United States.

The Michigan Watercraft Pollution Control Act of 1970 as particularly pertinent here, provides:

> Sec. 1 (g) "Watercraft" means any contrivance used or capable of being used for navigation upon water, whether or not capable of self-propulsion, including foreign and domestic vessels engaged in commerce upon the waters of this state, passenger or other cargo-carrying vessels and privately owned recreational watercraft.
>
> Sec. 3 (1) A person shall not place, throw, deposit, discharge or cause to be discharged into or onto the waters of this state, any litter, sewage, oil or other liquid or solid materials which render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes.
>
> Sec. 4 (2) A person owning, operating or otherwise concerned in the operation, navigation or management of a watercraft having a marine toilet shall not own, use or permit the use of such toilet on the waters of this state unless the toilet is equipped with one of the following pollution control devices:

(a) A holding tank or self-contained marine toilet which will retain all sewage produced on the watercraft for subsequent disposal at approved dockside or onshore collection and treatment facilities.

(b) An incinerating device which will reduce to ash all sewage produced on the watercraft. The ash shall be disposed of onshore in a manner which will preclude pollution.

Sec. 11. Any person who violates any provision of this act is guilty of a misdemeanor and shall be fined not more than $500.00. To be enforceable, the provision or the rule shall be of such flexibility that a watercraft owner, in carrying out the provision or rule, is able to maintain maritime safety requirements and comply with the federal marine and navigation laws and regulations.

QUESTIONS PRESENTED.

1. Did the Trial Court abuse its discretion in abstaining from deciding the issues raised by the pleadings and the evidence?

Query: Under what circumstances may the Federal Courts act when there is no prosecution pending in State Courts at the time the Federal proceeding is begun?

2. Did the Trial Court abuse its discretion in failing to permanently enjoin enforcement of the Michigan Watercraft Pollution Control Act of 1970 because said Act is constitutionally infirm?

Query: Under what circumstances can a State prescribe shipboard equipment on Federally licensed vessels?

STATEMENT OF THE CASE.

Appellants brought this action to determine the constitutional validity of the Michigan Watercraft Pollution Control Act of 1970 (Act 167, Public Acts of 1970, State of Michigan) as applied to Federally licensed vessels engaged in interstate and foreign commerce upon the waters of the Great Lakes. At the outset, appellants wish to make it abundantly clear to the Court that they are not challenging Michigan's law out of any desire to avoid responsibility for preserving the ecology. Such is the duty of every citizen. Rather, appellants' interests go beyond the waters of Michigan and extend to all of the Great Lakes states. Only through uniform standards applicable throughout the entire Great Lakes, including the waters of Canada, can the water quality of the lakes be preserved. That is the objective here.

Collectively, appellants, with the exception of Lake Carriers' Association, are the owners and/or operators of 187 Federally enrolled and licensed Great Lakes bulk cargo vessels (A. 33). Great Lakes vessels are distinct in construction and design. The deck crew is housed forward and the engine crew aft, with the entire center portion of the vessel being devoted to cargo. (Exhibit B is a profile drawing of a typical Great Lakes bulk cargo vessel.)

Appellants provide vessel transportation, some for their own account and some for the account of others, or both, throughout the entire Great Lakes-St. Lawrence Seaway System. They serve in interstate and foreign commerce all of the major ports in the States of Minnesota, Wisconsin, Illinois, Indiana, Michigan, Ohio, Pennsylvania, New York and the Provinces of Ontario and Quebec, Canada (A. 33, 34). The flow charts (attached to appellants' Jurisdictional Statement), prepared by the Great Lakes Regional Statistical Office of the Corps of Engineers for

the year 1964 (the last year for which such charts are available), show by principal commodities the commerce of the Great Lakes and fully demonstrate the interstate nature of that commerce. The trade patterns shown are typical of those existing today, the only difference being that in 1964 the total Great Lakes bulk commodity movement involving the principal commodities, iron ore, coal, grain, stone and petroleum, was 202,830,576 net tons, whereas in 1970 that same movement was 223,404,329 net tons.

In all, as of January 1, 1970, there were a total of 442 vessels in excess of 1,000 tons on the Great Lakes. Of this total, 263 were vessels of United States registry, having a combined tonnage of 1,802,776 gross tons, and 179 were vessels of Canadian registry having a combined tonnage of 1,576,165 gross tons (A. 33).

Great Lakes vessels have the capability of operating within the Great Lakes system as far east as Anticosti Island and lift from 12,000 to 25,000 tons of cargo (A. 38). Depending upon their trades, some vessels, while traversing Michigan waters, never touch at Michigan ports (A. 39). Other vessels, while trading into Michigan ports part of the time, may at other times engage in different trades such as between Toledo, Ohio and Buffalo, New York or Chicago, Illinois and Oak Creek, Wisconsin, where they not only do not touch at Michigan ports, but they do not even traverse Michigan waters (A. 53).

Crew size ranges from thirty to thirty-five men per vessel. Each man generates approximately 125 gallons of liquid wastes per day. This includes wash water, drainage from normal showers and vehicle water to handle sanitary facilities (A. 39, 40). Act 167 of the Public Acts of Michigan, 1970, provides that a vessel having a marine toilet may not use, or permit the use of, such toilet on the waters

of the State unless the toilet is equipped with one of the following pollution control devices:

(a) A holding tank or self-contained marine toilet which will retain all sewage produced on the watercraft for subsequent disposal at approved dockside or onshore collection and treatment facilities.

(b) An incinerating device which will reduce to ash all sewage produced on the watercraft. The ash shall be disposed of onshore in a manner which will preclude pollution.

Act 167 of the Public Acts of Michigan, 1970, also provides that a person shall not discharge into or onto the waters of the State any other liquid or solid materials which render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health and welfare or to the enjoyment of the water for recreational purposes.

While the Michigan Water Resources Commission has expressed an intent to enforce the Act, at the present time, only with respect to sewage from toilets, it is evident that in light of the broad scope of the Michigan law, any prudent vessel owner installing holding tanks on a vessel would seek total containment of all discharges because of the uncertainty with respect to what constitutes a noxious or unwholesome discharge (A. 40). To contain all such wastes would require, considering the number of men involved, the amount of liquid wastes created, existing trade patterns, the length of the voyage and attendant delays, a holding tank of at least 20,000 gallons at either end of the vessel, or a total retention capacity of 40,000 gallons (A. 40).

It is not feasible to utilize the existing ballast tanks on the vessel for the holding of raw sewage because of the necessity under the vessel inspection laws for periodic

physical inspection, which requires personnel to actually enter and crawl through the vessel spaces in order to examine the integrity of the hull (A. 74). Further, the placing of raw sewage against the hull structure of a vessel could result in serious corrosion and sanitary problems (A. 74).

Were the vessel owners to install holding tanks, it would be necessary to have pump-out facilities at basically every port on the Great Lakes in order to carry on normal trade (A. 43). Not only are there no pump-out facilities for commercial vessels in states other than Michigan, there are no such pump-out facilities even in Michigan (A. 94). Because there are no pump-out facilities in Michigan or elsewhere at the present time, the only alternative for a vessel with holding tanks is to pump those tanks out in the middle of the lake (A. 106).

With the exception of Escanaba and St. Joseph-Benton Harbor, none of the port cities in Michigan provide secondary treatment of municipal sewage wastes (A. 135). Thus, were commercial vessels at the present time to install holding tanks and pump into municipal facilities, no better than primary treatment could be achieved.

Treatment devices suitable for shipboard installation on commercial vessels are available which produce the equivalent of secondary waste treatment (A. 45). Such facilities are already in use on some 27 Great Lakes vessels (Exhibit 4). Further, the use of such devices, commonly called "package plants," is prevalent on land for small communities, shopping districts, resort areas and isolated industries (A. 78).

The Michigan Water Resources Commission readily admits that there is nothing wrong or harmful in a commercial vessel discharging an effluent in the open lake which has received the equivalent of secondary waste

treatment (A. 137, 138). At the same time, the Commission reiterates that it would be unfortunate from the standpoint of pollution control if a commercial vessel were to pump out holding tanks containing raw sewage in waters of the Great Lakes other than Michigan waters, but that it could do so, because from the standpoint of Michigan itself, jurisdiction ends with Michigan waters (A. 138).

On the Great Lakes, the pollution problems are essentially along the shore. When you collect waste on board a ship in a holding tank and bring it ashore, it results in further concentration at a given point (A. 78). By limiting vessels totally to holding tanks and/or incineration, it means that until such time as treatment devices equivalent to the biogest process are provided on shore, instead of accelerating pollution abatement from vessels, pollution abatement is actually being delayed because wastes are being brought ashore to a point to provide for treatment that does not exist (A. 78). Vessels should be permitted to provide treatment on a continuing basis so that the waste water discharge is no longer sewage, but actually treated waste water which meets the standards and requirements of the uses designated for Michigan waters (A. 88). Properly operated shipboard waste treatment devices such as the biogest process do not render the waters noxious or unwholesome, but result in an acceptable water supply (A. 83).

This litigation is not concerned with the relative merits of the conflicting policies of regulation by the federal and state governments. As was observed by Justice Jackson in *Franklin National Bank v. New York*, 347 U.S. 373, 378:

> "There appears to be a clear conflict between the law of New York and the law of the Federal Govern-

ment. We cannot resolve conflicts of authority by our judgment as to the wisdom or need of either conflicting policy. The compact between the states creating the Federal Government resolves them as a matter of supremacy. However wise or needful New York's policy, a matter as to which we express no judgment, it must give way to the contrary federal policy."

ARGUMENT.

I.

DID THE TRIAL COURT ABUSE ITS DISCRETION IN ABSTAINING FROM DECIDING THE ISSUES RAISED BY THE PLEADINGS AND THE EVIDENCE?

QUERY: UNDER WHAT CIRCUMSTANCES MAY THE FEDERAL COURTS ACT WHEN THERE IS NO PROSECUTION PENDING IN STATE COURTS AT THE TIME THE FEDERAL PROCEEDING IS BEGUN?

Point 1:

An actual controversy exists within the meaning of the Declaratory Judgment Act, 28 U.S.C. § 2201, which is ripe for determination.

Appellants contend that the District Court erred in holding that with respect to issues other than preemption the lack of a judiciable controversy precluded entry of the court into the matter.

It is recognized that the Federal Courts will not grant declaratory relief in instances where the record does not disclose an actual controversy. As was said in *Maryland Casualty Company v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273:

> "The difference between an abstract question and a 'controversy' contemplated by the Declaratory

> Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."

The District Court for some reason took the attitude that there is no case or controversy here because no prosecution is pending or threatened which would realistically infer that appellants in a trial of a case in State Court would be denied the benefits of the due process and equal protection clauses. That is not the test. Appellants do not claim bad faith on the part of Michigan officials, nor do they challenge the integrity of the Michigan courts. Appellants do contend, however, that the record in the present case establishes an actual controversy which should have been adjudicated by the lower court.

Appellants should not be required to continuously run the risk of criminal prosecutions in order to demonstrate the existence of an actual controversy. Appellants' vessels cannot enter Michigan waters without being subjected by statute to special disabilities, i.e., the installation of either holding tanks or incinerating devices, and all have a substantial, immediate and real interest in the validity of the statute which imposes that disability. *Evers v. Dwyer*, 358 U.S. 202.

Appellants are not here seeking an advisory opinion. They are confronted on the one hand, if state law is applicable, with the installation of holding tanks or incinerating devices. On the other hand, under Section 13 of the Water Quality Improvement Act of 1970, 33 U.S.C. § 1163,

flow-through treatment devices will be authorized and holding tanks or incinerating devices will not be required. Simply stated, the controversy is this: the Congress, in enacting the Water Quality Improvement Act of 1970, was as fully cognizant of the public interest in water pollution abatement as was the Michigan Legislature in enacting the Michigan Watercraft Pollution Control Act of 1970. The solution of Congress differs from that of the State of Michigan. Superimposed upon that issue are serious public questions as to the authority of the State to enact such legislation as concerns federally licensed vessels engaged in interstate and foreign commerce throughout the Great Lakes. Certainly it is in the paramount public interest to resolve these legal issues arising out of these conflicting solutions to the pollution problem and, as observed by this Court in *Dombrowski v. Pfister,* 380 U.S. 479, the solution of these issues cannot be satisfactorily achieved through a series of criminal prosecutions. Appellants contend that pollution abatement from federally licensed vessels is a federal matter and that Michigan has no legal right to require the installation of holding tanks or incinerating devices. No construction of the Michigan statute by a state court can avoid that issue. The conflict of interests is real and ripe for determination and the issues joined on the pleadings and the evidence should have been decided by the court below.

Point 2:

Supremacy clause cases are within the purview of a three judge court where there are also other substantial issues involving provisions of the Constitution.

Appellants contend that there are substantial issues of constitutional law here involved which bring the case within the purview of a three judge court.

The District Court's reliance on *Swift & Co. v. Wickham*, 382 U.S. 111, is misplaced. In that case, this Court found that appellant's commerce clause and fourteenth amendment claims were too insubstantial to support three judge court jurisdiction. Thus the issue was narrowed to the single question of whether an action grounded alone on the supremacy clause and involving as it does the comparison of two statutes rather than the interpretation of the Constitution, is within the purview of 28 U.S.C. § 2281. The court, page 125, noted two possible interpretations of 28 U.S.C. § 2281, the first that all suits to enjoin enforcement of a state statute, whatever the federal ground, must be channeled through three judge courts, and the second that no such suits resting *solely* on supremacy grounds fall within the statute. The decision was, page 128, that three judge courts are not required in supremacy clause cases involving *only* federal-state statutory conflicts. Thus, the instant case was properly brought before a three judge court because it involves substantial issues of constitutional law over and above the single issue of preemption.

Point 3:

The District Court abused its discretion in abstaining from deciding the merits of the challenge to the Michigan Watercraft Pollution Control Act of 1970.

Appellants contend that the issues joined on the pleadings and the evidence should have been decided by the District Court.

The abstention doctrine, first formulated in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, has gone through considerable refinement in recent years and may now fairly be said to be applicable only to those cases where a statutory construction applied by a state court would eliminate the constitutional issue and terminate the litigation. Such is not this case. Here, no state court construction of the Michigan Watercraft Pollution Control Act of 1970 could avoid the federal issues raised on the pleadings and the evidence. Abstention is inappropriate where there are no substantial problems of statutory construction and delay would prejudice constitutional rights. *Shelton v. McKinley*, 174 F. Supp. 351 (D.C. E.D., Ark.).

United States v. Livingston, 179 F. Supp. 9, 12-13 (D.C. E.D., S.D.), aff'd *Livingston v. United States*, 364 U.S. 281, holds:

> "Though never interpreted by a state court, if a state statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it."

In *City of Altus, Oklahoma v. Carr*, 255 F. Supp. 828 (D.C. W.D., Tex.), aff'd 385 U.S. 355, it was observed that the doctrine of abstention is not an absolute rule to be applied to all cases involving the constitutionality of a state

statute. It was further observed that the defendant had taken no affirmative action to enforce the statute involved, but the very presence of the statute itself and the possibility of its enforcement were grounds enough for declaratory relief. Said the court, page 837:

> "If * * * the statute in question (§ 2201) were to be strictly construed so as to require an affirmative 'threat,' the purpose of Section 2201 of Title 28, United States Code, would be defeated."

The recent series of cases involving first amendment rights has a bearing here. *Dombrowski v. Pfister, supra,* holds abstention inappropriate where a statute is justifiably attacked on its face and that an injunction is appropriate where no readily apparent construction is available to bring the statute within constitutional confines in a single prosecution.

Even more directly in point is *Zwickler v. Koota,* 389 U.S. 241. Appellant was convicted of violating a New York penal statute for distributing anonymous handbills critical of the record of a United States congressman seeking reelection. Following state proceedings the appellant invoked the District Court's jurisdiction under the Civil Rights Act, 28 U.S.C. § 1343 and the Declaratory Judgment Act, 28 U.S.C. § 2201, on the grounds that the state statute, on its face, was repugnant to the guarantees of free expression secured by the federal Constitution. The three judge district court applied the doctrine of abstention and dismissed the complaint, limiting the appellant to the New York courts to assert his constitutional challenge. This Court, after noting, page 244, that where abstention is proper, it is better practice, in a case raising a federal constitutional or statutory claim, to retain jurisdiction rather than to dismiss (a practice not followed in the instant

case), reversed, holding abstention improper. This Court pointed out that Congress imposed the duty upon the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. The doctrine of abstention sanctions such escape only in narrowly limited "special circumstances."

No construction by a state court of the Michigan statute could avoid the constitutional questions arising out of Michigan's demand that federally licensed vessels install holding tanks or incinerating devices. Abstention cannot be ordered simply to give state courts the first opportunity to vindicate a federal claim.

Younger v. Harris, 401 U.S. 37, and *Samuels v. Mackell,* 401 U.S. 66, are narrow in their holding, being limited to the propriety of declaratory or injunctive relief, while state criminal proceedings are pending. Michigan now argues that because there are no criminal prosecutions pending or threatened, injunctive relief and declaratory judgment procedures are not appropriate in the absence of a showing of bad faith. This argument overlooks the fact that prior to the opening of the navigation season in 1971, appellants sought and obtained a temporary restraining order from the District Court. Thus the state officials were precluded from instituting criminal prosecutions.

It should be clear, however, that there is no implication in this litigation that appellants are accusing state officials of bad faith or harassment. They are public spirited individuals attempting to carry out their duty as they see that duty under Michigan law. Thus, whether or not in first amendment cases bad faith enforcement must be shown to invoke federal jurisdiction (see Federal Juris-

diction and Procedure, 85 Harvard Law Review, No. 1, pages 301, 315) should not be the test here. Instead, in instances of this kind, the purpose of the Declaratory Judgment Act, as stated in *Edelmann & Co. v. Triple-A Specialty Co.*, 88 F.2d 852, 854, should be observed:

> "It was the congressional intent to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damage had accrued."

Point 4:

This Court should now proceed to decide on the merits the issues raised by the pleadings and the evidence.

Appellants contend that, abstention being clearly improper, to now remand the case to the District Court for further proceedings will merely result in the same delay and prolonged uncertainty as abstention.

Baggett v. Bullitt, 377 U.S. 360, involved a class action brought by members of the faculty, staff and students of the University of Washington to test the constitutionality of state statutes requiring the taking of two oaths, one enacted in 1955 applicable to state employees, and one enacted in 1931 applicable to teachers. The District Court held that the 1955 oath and underlying statutory provisions did not infringe upon any first and fourteenth amendment freedoms and were not unduly vague. With respect to the 1931 oath, the court held that, although the challenge raised a substantial constitutional issue, adjudication was not proper in the absence of proceedings in the state court which might resolve or avoid the constitutional issue. The action was then dismissed.

In reversing, this Court held that the abstention doctrine is not an automatic rule applied whenever a federal

court is faced with a doubtful issue of state law. The "special circumstances" necessary to justify abstention were not found to be present because a construction of the oath provisions in light of the vagueness challenge would not avoid or fundamentally alter the constitutional issue raised. This Court further noted that remitting the litigants to the state courts for a construction of the 1931 oath would further protract the proceedings, with only the likelihood that years later the case would return to the three judge district court and perhaps to this Court for a decision on the identical issues. This Court then proceeded to declare the 1931 oath unconstitutionally vague.

Thus there is ample precedent for this Court to proceed to decide the merits of this case. All the evidence that was before the District Court is before this Court, and to remand to the District Court would only delay the ultimate disposition of the proceedings. It is respectfully requested that this Court proceed to dispose of, on the merits, the issues raised on the pleadings and the evidence.

II.

DID THE TRIAL COURT ABUSE ITS DISCRETION IN FAILING TO PERMANENTLY ENJOIN ENFORCEMENT OF THE MICHIGAN WATERCRAFT POLLUTION CONTROL ACT OF 1970 BECAUSE SAID ACT IS CONSTITUTIONALLY INFIRM?

QUERY: UNDER WHAT CIRCUMSTANCES CAN A STATE PRESCRIBE SHIPBOARD EQUIPMENT ON FEDERALLY LICENSED VESSELS?

Point 1:

The Michigan Watercraft Pollution Control Act of 1970 conflicts with the Federal Water Pollution Control Act, as amended by the Water Quality Improvement Act of 1970 and impairs federal superintendence of the field.

Appellants contend that the state prescribed standards stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress because state requirements with respect to standards of performance for marine pollution control devices nullify federal discretion over the subject matter and interfere or conflict with the provisions of the federal legislation.

As previously stated, conflicts between federal and state law are to be resolved as a matter of supremacy, not policy. *Easton v. Iowa,* 188 U.S. 220, 229-230; *Davis v. Elmira Savings Bank,* 161 U.S. 275, 283. In determining supremacy, the principles enunciated in *Florida Lime and Avocado Growers, Inc. v. Paul,* 373 U.S. 132, appear applicable here. While the Court held that the maturity of avocados seems to be an inherently unlikely candidate for exclusive federal regulation, the Court did set forth the principles to be derived from its more recent decisions concerning federal regulation of commerce, namely, that

such federal regulation should be deemed preemptive of state regulatory power if either the nature of the regulated subject matter permits no other conclusion or that the Congress has unmistakably so ordained. In this instance, we believe that both tests have been amply met.

Certainly elaborate and costly pollution control devices on vessels which must serve the needs of eight separate states and two separate provinces of Canada are not only a likely but a logical candidate for exclusive federal regulation. Further, in *Avocado Growers, supra*, the state and federal regulations applied to different subject matters, whereas here the state and federal acts seek to regulate precisely the same field, to wit, the use, type and design of shipboard waste treatment systems for disposal of shipboard sewage.

A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design when compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce. *Union Bridge Co. v. United States*, 204 U.S. 364; *Morgan v. Virginia*, 328 U.S. 373. Indeed, in this instance national uniformity would appear to be so essential that all state action is inadmissible even in the absence of federal legislation. *Southern Pacific Co. v. Arizona*, 325 U.S. 761; *Bibb v. Navajo Freight Lines*, 359 U.S. 520.

But the power of Congress to exercise exclusive control over the operations in interstate commerce, specifically involved here, are not in dispute because the State of Michigan has admitted that upon the effective date of the proposed federal standards, federal law will preempt the field. The question is whether federal superintendence of the field requires that state regulation must give way now.

The obvious pervasiveness of federal supervision of the entire field of marine sanitation devices by statute and regulation is a strong factor favoring a finding of preemption. The fact that the Congress has directed and not merely authorized a comprehensive program for establishing standards for marine sanitation devices is a strong indication of preemptive intent. *Cloverleaf Butter Co. v. Patterson,* 315 U.S. 148; *Bethlehem Steel Co. v. New York State Labor Relations Board,* 330 U.S. 767.

The fact that diverse state laws occasioning contradictory or overlapping regulations, vis a vis, federal regulations in the same field, frustrate the congressional purpose to achieve uniformity, and has been viewed by this Court as a factor favoring preemption.

Thus, in *Hill v. Florida,* 325 U.S. 538, a state statute regulating labor union activities was struck down because the statute was an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The same is true of the Michigan Watercraft Pollution Control Act of 1970. While it is true that the proposed new federal standards for marine sanitation devices will not become effective for two years after promulgation for new vessels, and five years after promulgation for existing vessels, the clear and manifest purpose and intent of Congress was to permit vessel operators to design and develop necessary pollution control devices and install them on their vessels prior to the effective date of the standards. The Congress never intended that during this short interim period the States should come forward with a proliferation of varying and different requirements which, in effect, hamper and impede vessel operators from complying with federal law and prevent accomplishment and execution of the federal program.

The fact is that the Michigan Watercraft Pollution Control Act of 1970 has already interfered with the operation of federal law in that vessel operators are precluded from going forward with any type of realistic program which will enable them to comply wtih federal law. It is abundantly clear that the Michigan Watercraft Pollution Control Act of 1970 and the federal Water Quality Improvement Act of 1970 cannot move freely within the orbits of their respective purposes without impinging upon one another. *Union Brokerage Co. v. Jensen*, 322 U.S. 202.

In this instance, the prohibition of state action is inferable from the scope and purpose of the federal legislation. It is clear that the federal provisions are so inconsistent with those of the state that the state statute cannot be enforced without jeopardizing federal superintendence of the field. *Cloverleaf Butter Co. v. Patterson, supra.* The adequacy or inadequacy of the federal law is not the issue here. Congress has the power to preempt a field of activity within its constitutional authority, and has done so.

The very nature of the subject matter, namely, marine sanitation devices on board federally licensed vessels, requires state legislation to yield to federal authority. Federal supervision and exclusive federal regulation are absolutely essential in order to achieve uniformity vital to national interests. This the Congress recognized in passing the Water Quality Improvement Act of 1970.

Point 2:

The Congress, in enacting the Water Quality Improvement Act of 1970, expressed a clear and manifest intent and purpose to occupy the field.

Appellants contend that the Water Quality Improvement Act of 1970 demonstrates an unambiguous congressional mandate to the effect that it was occupying the field to the exclusion of all state regulations with respect to marine sanitation devices.

When the Federal Water Pollution Control Act was first enacted, it provided in the first section thereof (33 U.S.C. § 1151) that nothing in the Act should be construed as impairing or in any manner affecting any right or jurisdiction of the states with respect to the waters of such states. At the time of this pronouncement, however, the Act did not apply to vessels or to sanitary waste treatment devices on board vessels. The Water Quality Improvement Act of 1970, approved April 3, 1970, was enacted for the specific purpose of providing a federal program for vessels utilizing the navigable waters of the United States. It directs the promulgation of federal standards for the performance of marine sanitation devices to prevent the discharge of untreated or inadequately treated sewage into or upon the navigable waters of the United States from new and existing vessels. It further directs the promulgation of regulations consistent with maritime safety and the marine and navigation laws and regulations governing the design, construction, installation and operation of any marine sanitation device on board such vessels (33 U.S.C. § 1163).

The fact that the initial standards are not to become effective for new vessels until two years after promulgation, and for existing vessels five years after promulgation, does not mean that the Congress did not intend to

occupy immediately the field to the exclusion of all state regulations. The report of the Committee on Public Works, United States Senate, accompanying S. 7, the companion bill of H.R. 4148, which ultimately became the Water Quality Improvement Act of 1970 (91st Congress, First Session, Report # 91-351), states on page 11 that this new law will assist in preventing at the earliest possible time permitted by existing and advancing technology, economics and other practical considerations the discharge into the navigable waters of the United States of raw or inadequately treated sewage from vessels.

The Senate Public Works Committee further recognized the problems imposed by the shortcomings of present technology and economic impact on commercial vessels and the complexity of marine watercraft. Specifically, on page 12, the Senate Public Works Committee notes that conflicting regulations and standards relative to marine sanitation devices present a hardship and impose potentially serious restrictions on interstate movement of commercial vessels. The Congress intended to bring into being an orderly program, and there can be no order, only chaos, if in the interim until such program becomes fully effective, the states are permitted to impose a variety of divergent and conflicting requirements.

The problem is primarily one of statutory construction. Where the United States exercises its power of legislation so as to conflict with a regulation of a state either specifically or by implication, state legislation becomes inoperative and the federal legislation exclusive in its application. *Cloverleaf Butter Co. v. Patterson, supra; Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 437; *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 612.

Many of the existing vessels of appellants will be in immediate compliance with the federal standards as soon as they are promulgated. Such compliance will be mean-

ingless, however, if the Michigan statute stands. The prescription of holding tanks and incinerating devices by Michigan nullifies all federal discretion. Certainly the Congress did not intend to adopt a useless Act. Neither did it intend for the Coast Guard to promulgate useless regulations and certify useless devices which cannot be utilized because of state law.

Should there be any doubt as to the expressed preemptive intent of Congress, the canons of construction stated by this Court strongly favor the conclusion that the disputed field of regulation has been preempted. *Bethlehem Steel Co. v. New York State Labor Relations Board, supra; LaCrosse Telephone Corp. v. Wisconsin Employment Relations Board,* 336 U.S. 18; *Garner v. Teamsters Union,* 346 U.S. 485.

Further, the Water Quality Improvement Act of 1970 requires that the Congress itself approve the equipment which is to be installed on board vessels under the requirements of the Act. Before the effective date of any federal standards the Secretary of the Interior must report to Congress the results of such research, studies, experiments and demonstrations he has conducted (33 U.S.C. § 1155 (j)). This shows a clear and manifest intent of Congress to reserve unto itself control of the development and installation of marine sanitation devices. The Water Quality Improvement Act of 1970 is a comprehensive scheme for a uniform, orderly development of a pollution control program for vessels throughout the navigable waters of the United States. A time frame has been built into the Act to permit such orderly development and certainly it was not the intent of Congress for states, in the interim, to come forward with a proliferation of legislation, rules and regulations which completely nullifies that program.

Point 3:

The vessel inspection laws administered by the United States Coast Guard preclude state prescribed standards with respect to shipboard pollution control devices.

Appellants contend that applicable federal standards governing the structure and equipment of federally licensed vessels preclude state prescription of shipboard equipment.

In addition to the Water Quality Improvement Act of 1970 there must also be considered the Steamboat Inspection Acts of February 28, 1871 and May 27, 1936 (46 U.S.C. § 361, et seq.) in determining preemption. For many years the Congress has maintained an extensive and comprehensive set of inspection laws relating to the form, design, workmanship, age and use of vessels. Based upon these inspection laws, the vessels of appellants are actually licensed (46 U.S.C. § 263) and enrolled (46 U.S.C. § 258) by the National Government. The purpose of federal inspection statutes, of course, is to insure the seagoing safety of vessels and that the equipment may be safely employed in the service proposed. The installation of holding tanks or incinerating devices on board vessels involve such matters as vessel stability, hull integrate and health. The inspection laws extend to the design, construction and the material of every part of the vessel. But the duty of the Coast Guard is not merely to inspect. It also prescribes the rules and regulations by which fitness for service shall be determined. There can be no question but that the Michigan Watercraft Pollution Control Act of 1970 is squarely in conflict with these federal statutes.

In *Napier v. Atlantic Coast Line R. Co., supra,* state requirements concerning automatic firebox doors on locomotives and state requirements concerning cab curtains

during winter months were held to be invalid because the Boiler Inspection Act was intended to occupy the field. Said the Court, pages 612, 613:

> "The federal and the state statutes are directed to the same subject—the equipment of locomotives. They operate upon the same object. It is suggested that the power delegated to the Commission has been exerted only in respect to minor changes or additions. But this, if true, is not of legal significance. It is also urged that, even if the Commission has power to prescribe an automatic firebox door and a cab curtain, it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power. We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field."

Under the Water Quality Improvement Act of 1970 and the vessel inspection laws, the Coast Guard is entitled to insist on different equipment than that prescribed by the Michigan statute. Because the standards set by the Coast Guard must prevail, state requirements are precluded. No state authority can change federal specifications, yet that, in effect, is what the State of Michigan here seeks to do. As was said in *Kelly v. Washington*, 302 U.S. 1, a state inspection system may touch matters which the federal laws and regulations leave untouched. State rules which change the federal standards for the structure and equipment of vessels meet a different fate. Said this Court, pages 14, 15:

> "The state law is a comprehensive code. While it excepts vessels which are subject to inspection under the laws of the United States, it has provisions which

may be deemed to fall within the class of regulations which Congress alone can provide. For example, Congress may establish standards and designs for the structure and equipment of vessels, and may prescribe rules for their operation, which could not properly be left to the diverse action of the States. The State of Washington might prescribe standards, designs, equipment and rules of one sort, Oregon another, California another, and so on."

There can be no doubt but that the overlap between the scope of the vessel inspection laws and the Michigan Watercraft Pollution Control Act of 1970 is such that the federal inspection legislation has preempted local action. To hold otherwise would be to ignore the teachings of this Court that state action which is unduly burdensome on maritime actions or interstate commerce is prohibited. *Minnesota v. Barber*, 136 U.S. 313; *Morgan v. Virginia*, *supra*; *Bibb v. Navajo Freight Lines*, *supra*.

Readily distinguishable is the case of *Huron Cement Co. v. Detroit*, 362 U.S. 440. In that case the City of Detroit sought only to limit certain smoke emission from vessels—not to eliminate them entirely. Further, the footnote of the Court, page 442, clearly indicates that while the Detroit legislation contained provisions making it unlawful to operate any combustion equipment without a certificate, there was nothing in the record to indicate that at any time the City had attempted to enforce these provisions with respect to the actual equipment aboard the vessels.

Not so here. The Michigan Watercraft Pollution Control Act of 1970 specifically attempts to regulate and prescribe the type of pollution control equipment which must be installed upon federally licensed vessels before entering Michigan waters, even though, early in our history, this Court, in the landmark decision of *Gibbons v. Ogden*,

9 Wheat. 1, held that a state may not exclude from its waters a ship operating under a federal license. It is plain that even though waste treatment devices may have been inspected and approved by the Coast Guard, the Michigan Act attempts to prescribe different equipment, namely, holding tanks or incinerating devices.

Under the Michigan Act, the biogest system, with which many vessels are equipped, and which produces an overboard effluent equal to secondary municipal waste treatment, is not permitted, despite the fact that it had been approved by the Coast Guard for shipboard installation. In other words, such equipment, approved and licensed by the Federal Government for use on navigable waters, cannot pass muster under local Michigan law. As was said in *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. 518, page 566, no state law can hinder or obstruct the free use of a license granted under an Act of Congress. As already indicated, the requirements of Michigan may be too lax for another state such as Wisconsin. The variety of requirements for equipment which the states may provide, in order to meet what they alone consider their water pollution needs, underlies the importance of federal regulations serving as authority for vessels to use in all of our ports the equipment which, under federal regulations, is certified.

Point 4:

The Michigan Watercraft Pollution Control Act of 1970 materially affects interstate and foreign commerce in matters where uniformity is necessary and relates to a subject demanding exclusive federal regulation.

Appellants contend that the subject matter of the Michigan Watercraft Pollution Control Act of 1970 demands material uniformity of federal regulation and that state action is altogether inadmissible even in the absence of federal action.

It is a canon principle of constitutional law that a state may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary. *Hull v. De Cuir,* 95 U.S. 485; *Southern Pacific Co. v. Arizona, supra; Bibb v. Navajo Freight Lines, supra.* While the scheme of federal regulation here appears so persuasive as to make reasonable the inference that Congress left no room for the state to supplement, the appellants contend that even in the absence of federal regulation, the federal interest is so dominant and the need for uniformity so significant that the states may not act.

We are here dealing with specific equipment on vessels which must serve the commercial needs of some eight separate states and two provinces of Canada. If the matter of pollution control devices is left to the whim of each individual state, only chaos can result. The impermissible burden on interstate commerce is readily apparent. The State of Michigan has invaded the exclusive jurisdiction of interstate commerce which the Constitution, by agreement among the several states, has specifically reserved to the Federal Government. The Michigan Watercraft Pollution Control Act of 1970 discriminates against interstate commerce, operates to disrupt its required uniformity, and may not constitutionally stand.

Point 5:

The Michigan Watercraft Pollution Control Act of 1970 contravenes the essential purposes of and works material injury to characteristic features of the maritime law and interferes with its proper harmony and uniformity.

Appellants contend that the installation and operation of sanitation devices on commercial vessels is maritime in nature, is national in character, and admits and requires uniformity of regulation consistent with uniform maritime law.

Apart from Article I, Section 8, Clause 3 of the Constitution relating to interstate and foreign commerce, the Constitution denies to the states all power by legislation to contravene the essential purposes of or to work material injury to the characteristic features of the maritime law or to interfere with its proper harmony and uniformity.

Article III, Section 2 of the Constitution extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction"; and Article I, Section 8 confers upon the Congress power "to make all laws which may be necessary and proper for carrying into execution the foregoing powers and all other powers vested by the Constitution in the Government of the United States or in any department or offices thereof." It is settled doctrine that in consequence of these provisions Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. *Butler v. Boston & Savannah Steamship Co.*, 130 U.S. 527.

Indeed, the Constitution itself has occupied the field by taking from the states all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of maritime law or to interfere with its proper harmony and uni-

formity. *The Lottawanna,* 21 Wall. 558; *Workman v. New York City,* 179 U.S. 552; *The Moses Taylor,* 4 Wall. 411; *Steamboat Co. v. Chase,* 16 Wall. 522; *The Roanoke,* 189 U.S. 185.

In *The Lottawanna, supra,* it was said, page 575:

> "One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."

In *Southern Pacific Co. v. Jensen,* 244 U.S. 205, this Court held that New York could not apply its Workmen's Compensation Act to stevedores injured in New York while unloading a vessel engaged in coastwise traffic. If the several states could subject ships to the obligations of their compensation statutes, said this Court, page 217:

> "The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded."

If the mere unloading of a vessel is immune from state regulation, then certainly the actual equipment aboard a vessel, such as sanitation devices, is likewise immune.

Following the *Jensen* decision, Congress enacted a statute to permit the several states to apply their compensation laws to maritime injuries. In *Knickerbocker*

Ice Co. v. Stewart, 253 U.S. 149, the statute was held to be beyond the power of Congress. Said this Court, page 164:

> "The definite object of the grant (of power of Congress to legislate on rights and liabilities within maritime jurisdiction) was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union."

This Court noted a distinction between the indicated situation created by the Constitution relative to maritime affairs and the one resulting from the mere grant of power to regulate commerce. Said this Court, page 166:

> "Here we are concerned with a wholly different constitutional provision—one which, for the purpose of securing harmony and uniformity, prescribes a set of rules, empowers Congress to legislate to that end, and prohibits material interference by the States. Obviously, if every state may freely declare the rights and liabilities incident to maritime employment, there will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent."

Conflicting state regulations and standards relative to pollution control devices present a potentially serious restriction on the interstate movement of commercial vessels—the very situation that the Constitution seeks to avoid by placing exclusive jurisdiction to legislate with respect to maritime matters in the Federal Government. There can be no doubt that sanitation devices installed aboard federally licensed commercial vessels are maritime in nature and deserving of uniform treatment in the interest of securing the harmony of the maritime law.

Point 6:

The Michigan Watercraft Pollution Control Act of 1970 constitutes the taking of appellants' property without due process of law in violation of Section I of the 14th Amendment of the Constitution of the United States.

Appellants contend that the Michigan Act seeks to compel them to install equipment and devices which will or may become wholly obsolete or otherwise worthless upon the promulgation of federal standards and which devices are of no immediate benefit to anyone because there are as yet no waste discharge facilities available for commercial vessels in any of the ports of Michigan or the ports of any other states. Further, appellants are without an adequate remedy in law because vessels transiting Michigan waters and not touching at Michigan ports have no legal means of compelling the installation of pump-out facilities in any other state.

It is recognized that the authority of the States to make regulations affecting commerce is absolute, except insofar as that power has been restricted by the Constitution of the United States. *License Cases*, 5 How. 504, 583. The Fourteenth Amendment, as respects state action, does not prohibit governmental regulation for the public welfare, but it does condition the exercise of that power by requiring that the end shall be accomplished by methods consistent with due process, and, as has often been held, the guarantee of due process demands that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be attained. *Nebbia v. New York*, 291 U.S. 502, 524.

In inquiring into the reasonableness of an Act, the Court must evaluate the relative weights of the beneficial

consequences which would follow from upholding the statute and the price which must be paid for them in the form of the resulting deprivation of rights or property. See *The Consideration of Facts in Due Process Cases*, 30 Columbia Law Review 360, 362.

Liggett Co. v. Baldridge, 278 U.S. 105, holds that the legislation must be reasonably calculated to attain the desired objective. See also *Burns Baking Co. v. Bryan*, 264 U.S. 504; *Smith v. Texas*, 233 U.S. 630.

If alternate methods are available for attaining a desired end, the fact that one entails a greater deprivation than the other is a factor for consideration on the validity of the legislative choice. *Weaver v. Palmer Bros. Co.*, 270 U.S. 402. Involved in the *Weaver* case was a statute of Pennsylvania which prohibited the use of shoddy in the manufacture of comfortables. Evidence was introduced to the effect that the manufacturer used effective steam sterilizers and that shoddy may be rendered harmless by disinfection and sterilization. The Court held that as against this fact the provision in question could not be sustained as a measure to protect health and that the absolute prohibition of the use of shoddy was purely arbitrary and violated the due process clause of the Fourteenth Amendment.

In the instant case, Michigan seeks to compel appellants to install pollution control devices which, upon the promulgation of federal standards, will or may become wholly obsolete or otherwise worthless. Moreover, there are no pump-out facilities in Michigan suitable for commercial vessels, and therefore any holding tanks installed upon appellants' vessels would have to be discharged overboard anyway so that the objective which the Michigan statute seeks to achieve cannot be accomplished.

Even were pump-out facilities available, the objective of the Michigan Act would still be thwarted because Michigan municipalities and shore cities are not yet providing secondary waste treatment; indeed, most municipalities are way behind schedule and at present provide only primary treatment.

Accordingly, the beneficial consequences that would follow from upholding the Michigan statute are nil and yet the price that the appellants must pay is severe. Alternate methods are available for obtaining the desired end; namely, the installation of shipboard waste treatment systems equal to secondary waste treatment which appellants anticipate will be permitted under the federal standards.

In considering the validity of the legislative position, it becomes abundantly clear that the Michigan Watercraft Pollution Control Act of 1970 is unreasonable, arbitrary, and capricious in that the means selected have no real or substantial relationship to the objectives sought to be attained, particularly in view of the alternate methods which are available for attaining the desired end.

Point 7:

The Michigan Watercraft Pollution Control Act of 1970 denies to appellants the equal protection of the laws in violation of Section I of the Fourteenth Amendment of the Constitution of the United States in that such Act makes it unlawful for commercial vessels to discharge overboard any sewage whether treated or not while at the same time no Michigan law prohibits shore-based industry and municipalities from discharging inadequately treated sewage into the waters of the Great Lakes.

Appellants contend that requiring commercial vessels to discharge waste ashore into municipal waste treatment systems when the principal ports of Michigan have not yet met the standards for secondary treatment imposed upon them by the Michigan Water Resources Commission is a denial of the equal protection of laws, particularly when there is no evidence that by requiring commercial vessels to discharge wastes ashore there is any better treatment of sewage than the vessels can provide themselves given adequate time in which to comply with anticipated federal standards for the performance of marine sanitation devices.

The purpose of the equal protection clause of the Constitution is to rest the rights of all persons upon the same rule under similar circumstances. *Louisville Gas Co. v. Coleman*, 277 U.S. 32, 37. A corporation is as much entitled to the equal protection of the laws as an individual. *Santa Clara County v. Southern Pacific R.R. Co.*, 118 U.S. 394; *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389; *Gulf, Colorado and Santa Fe Ry. v. Ellis*, 165 U.S. 150. Any classification made under a state statute must rest upon some ground of difference having a fair and substan-

tial relationship to the objective of the legislation so that all persons similarly circumstanced shall be treated alike. *Schlesinger v. Wisconsin*, 270 U.S. 230, 240. Mere difference is not enough. The attempted classification must always rest upon some difference which bears a reasonable and just relation to the Act in respect to which the classification is proposed and can never be made arbitrarily and without any such basis. *Gulf, Colorado & Santa Fe Ry., supra; Louisville Gas Co. v. Coleman, supra.*

The Michigan Watercraft Pollution Control Act of 1970 seeks to prohibit completely and entirely the overboard discharge of wastes from appellants' vessels while at the same time no Michigan law prohibits municipalities or shore based industry from discharging into the Great Lakes. The State obtains no benefit since the shore cities of Michigan do not yet have secondary waste treatment to an extent sufficient to receive wastes from all commercial vessels. There is no evidence that the discharge of waste from a vessel, given secondary treatment, is any more harmful than similar discharges from municipalities or industry. The Michigan Watercraft Pollution Control Act of 1970 does not rest upon any reasonable basis, is essentially arbitrary, and denies to appellants the equal protection of the laws.

Point 8:

The Michigan Watercraft Pollution Control Act of 1970 violates constitutional requirements of due process and equal protection of the laws in that the Act is so vague and ambiguous that it does not specify with sufficient certainty the conduct which it intends to proscribe and punish.

Appellants contend that the Act is so vague and uncertain that men of ordinary intelligence must guess at its meaning and differ as to its application with respect to (1) what discharges render the waters unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health and welfare, or to the enjoyment of the waters for recreational purposes; and (2) the degree of flexibility of the provision or the rule which will permit a watercraft owner, in carrying out the provisions of the rule, to maintain maritime safety requirements and comply with the federal marine and navigation laws and regulations.

It is fundamental law that penal statutes must proscribe with appropriate certainty and definiteness the crimes they seek to punish and the test applied in determining compliance with this requirement is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. *Pierce v. United States,* 314 U.S. 306. The standards of certainty in penal statutes are higher than those depending primarily on civil sanction for their enforcement. *Winters v. New York,* 333 U.S. 507. There are no constructive criminal offenses and statutory offenses cannot be established by implication. A penal statute should not be admitted of such a double

meaning that a citizen can act on one conception of its requirements and the courts on another. A penal statute must be sufficiently explicit to inform those subject to it what acts it is their duty to avoid or what conduct on their part will render them liable to those penalties.

The Michigan Watercraft Pollution Control Act of 1970 fails to meet the above test. Paragraph (1) of Section 3 of the Act seeks to prohibit discharges into or onto the waters of the State of all liquid or solid materials which render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or interfere with the enjoyment of the waters for recreational purposes.

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, Unabridged, Merriam-Webster, 1966, states that the word noxious is derived from the Latin words *noxius* and *noxa*, meaning damage, offense, harm, and is akin to the Latin word *nocere*, meaning to harm, *nec-, nex* violent death, Greek *nekros* dead body.

A fifth of whiskey consumed in a hour can be fatal, whereas, a fifth of whiskey consumed over a period of weeks or months may be medicinally beneficial. By similar token, what degree of deposit of liquid or solid materials, i.e., sewage, into the waters of the State renders the waters noxious or unwholesome? When does such a discharge become detrimental to the public health or welfare or interfere with the enjoyment of the waters for recreational purposes? What is the standard? Certainly men of reasonable intelligence may well differ.

Further, Paragraph (2) and Paragraph (1) of Section 3 are patently inconsistent. Paragraph (2) appears to prohibit the discharge of any sewage from a watercraft, whereas, Paragraph (1) would appear to permit such a

discharge provided the waters are not rendered unsightly, noxious, or otherwise unwholesome so as to be detrimental to the public health or welfare or interfere with the enjoyment of the waters for recreational purposes. The two provisions cannot be enforced simultaneously, nor can they be reconciled.

Even more vague and ambiguous is Section 11 of the Act. That section provides that any person who violates the Act is guilty of a misdemeanor and subject to a fine of not more than $500. To be enforceable, however, Section 11 adds:

> "the provision or the rule shall be of such flexibility that a watercraft owner, in carrying out the provision or rule, is able to maintain maritime safety requirements and comply with the federal marine and navigation laws and regulations."

What is meant by the provision and what is meant by the rule? If it is means to be any provision of the Act, then how flexible is each provision to be enforceable?

Finally, the federal marine and navigation laws and regulations would seem to include the Water Quality Improvement Act of 1970. Is the Michigan Act intended to be so flexible that a vessel in compliance with the Federal Act is automatically in compliance with the Michigan Act? These are questions that ordinary citizens of reasonable intelligence cannot answer with certainty. It logically follows that constitutionally the Michigan Act must fail because of the uncertainty and ambiguity as to its requirements.

CONCLUSION.

Appellants contend that the Michigan Watercraft Pollution Control Act of 1970 is unconstitutional, null and void because it interferes with federal superintendence of the field, it is contrary to the manifest intent and purpose of Congress, relates to a subject affecting interstate commerce in matters where uniformity is essential, interferes with the uniform maritime Law, violates constitutional requirements of due process and equal protection of the laws, and is so vague and ambiguous in its terms as to be constitutionally unenforceable.

Respectfully submitted,

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1971

Supreme Court, U.S.
FILED
JAN 21 1972
E. ROBERT SEAVER, CLERK

No. 71-422

LAKE CARRIERS' ASSOCIATION and AMERICAN STEAMSHIP COMPANY, *et al.*,

Appellants,

vs.

RALPH A. MacMULLAN, Individually and as Director, Michigan Department of Natural Resources, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF AMICI CURIAE ON BEHALF OF ASSURANCEFORENINGEN GARD, ASSURANCEFORENINGEN SKULD, THE BRITANNIA STEAM SHIP INSURANCE ASSOCIATION, LIMITED, THE JAPAN SHIP OWNERS MUTUAL PROTECTING AND INDEMNITY ASSOCIATION, THE LIVERPOOL AND LONDON STEAM SHIP PROTECTION AND INDEMNITY ASSOCIATION, LIMITED, THE LONDON STEAMSHIP OWNERS' MUTUAL INSURANCE ASSOCIATION, LIMITED, NEWCASTLE PROTECTION AND INDEMNITY ASSOCIATION, THE NORTH OF ENGLAND PROTECTING & INDEMNITY ASSOCIATION LIMITED, THE STANDARD STEAMSHIP OWNERS' PROTECTION AND INDEMNITY ASSOCIATION LIMITED, THE STANDARD STEAMSHIP OWNERS' PROTECTION & INDEMNITY ASSOCIATION (BERMUDA) LIMITED, THE STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION, LIMITED, SUNDERLAND STEAMSHIP PROTECTING & INDEMNITY ASSOCIATION, SVERIGES ANGFARTYGS ASSURANS FORENING, THE UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION (BERMUDA) LIMITED, THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG), AND THEIR RESPECTIVE MEMBERS, IN SUPPORT OF APPELLANTS LAKE CARRIERS' ASSOCIATION, AMERICAN STEAMSHIP COMPANY, et al.

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The United States Limited Liability Act, Title 46, U.S.C. §§ 183-189 17

Water Pollution Control Compact Act, c. 407, 61 Stat. 682 ..... 14, 14n

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46 U.S.C. §§ 341-436 ..... 16n

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-422

LAKE CARRIERS' ASSOCIATION AND AMERICAN STEAMSHIP COMPANY, *et al.*,

Appellants,

VS.

RALPH A. MACMULLAN, Individually and as Director, Michigan Department of Natural Resources, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF OF ASSURANCEFORENINGEN GARD, ASSURANCEFORENINGEN SKULD, THE BRITANNIA STEAM SHIP INSURANCE ASSOCIATION, LIMITED, THE JAPAN SHIP OWNERS MUTUAL PROTECTING AND INDEMNITY ASSOCIATION, THE LIVERPOOL AND LONDON STEAM SHIP PROTECTION AND INDEMNITY ASSOCIATION, LIMITED, THE LONDON STEAMSHIP OWNERS' MUTUAL INSURANCE ASSOCIATION LIMITED, NEWCASTLE PROTECTION AND INDEMNITY ASSOCIATION, THE NORTH OF ENGLAND PROTECTING & INDEMNITY ASSOCIATION LIMITED, THE STANDARD STEAMSHIP OWNERS' PROTECTION AND INDEMNITY ASSOCIATION LIMITED, THE STANDARD STEAMSHIP OWNERS' PROTECTION & INDEMNITY ASSOCIATION (BERMUDA) LIMITED, THE STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION, LIMITED, SUNDERLAND STEAMSHIP PROTECTING & INDEMNITY ASSOCIATION, SVERIGES ANGFARTYGS ASSURANS FORENING, THE UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION (BERMUDA) LIMITED, THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG) AND THEIR RESPECTIVE MEMBERS, AS AMICI CURIAE.

Assuranceforeningen Gard, Assuranceforeningen Skuld, The Britannia Steam Ship Insurance Association, Limited, The Japan Ship Owners Mutual Protecting and Indemnity Association, The Liverpool and London Steam Ship Protection and Indemnity Association, Limited, The London Steamship Owners' Mutual Insurance Association Limited,

Newcastle Protection and Indemnity Association, The North of England Protecting & Indemnity Association Limited, The Standard Steamship Owners' Protection and Indemnity Association Limited, The Standard Steamship Owners' Protection & Indemnity Association (Bermuda) Limited, The Steamship Mutual Underwriting Association, Limited, Sunderland Steamship Protecting & Indemnity Association, Sveriges Angfartygs Assurans Forening, The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, The West of England Ship Owners Mutual Protection and Indemnity Association (Luxembourg) ("the Associations"), and their respective members, respectfully submit their brief *amici curiae*, in support of Appellants herein, on consent of all parties pursuant to Rule 42.2. The consent of Appellants is evidenced by their letter to counsel for the Associations dated January 17, 1972, and the consent of Appellees by their letter of same date; the originals of these letters have been submitted to the Clerk for filing with this Brief.

QUESTIONS PRESENTED

The questions presented on this appeal are set forth at pp. 5-7 of Appellants' Jurisdictional Statement and need not be repeated here in detail. In the view of the Associations, the underlying question presented for this Court's decision is the fifth of those enumerated by Appellants, *i.e.*, does the Michigan Watercraft Pollution Control Act of 1970 ("the Michigan Act")[1] contravene the essential purposes of, and work material injury to characteristic features of the maritime law and interfere with its proper harmony and uniformity? If this Court answers this question affirmatively, the Michigan Act must be struck

[1] Act 167, PUBLIC ACTS OF 1970, STATE OF MICHIGAN; S.L. '48 § 323.331; M.S.A. § 5353(201) *et seq.* The text of the Act is set out in full as Appendix G to Appellants' Jurisdictional Statement (pp. 56-60).

down as contrary to the Admiralty Clause of the Constitution.[2]

The preliminary question requiring consideration by this Court is whether or not the three-judge court below abused its discretion in declining to consider the constitutionality of the Michigan Act.

INTEREST OF AMICI CURIAE

The Associations filing this brief as *amici* are composed of the owners and operators of approximately three-quarters of the world's ocean-going vessel tonnage, flying the flags of almost every maritime country, including approximately 4 million tons under American flag. The members of each of the Associations mutually insure one another on the indemnity principle, through the medium of their particular Association, against liabilities of numerous types arising out of the ownership and operation of their vessels, including liabilities for pollution damage. A substantial number of vessels owned or operated by members of the Associations call at Michigan ports. The Associations and their respective members are therefore materially affected by the Michigan Act, inasmuch as it purports to require substantial structural modifications in all vessels entering Michigan waters and provides that any person violating any of its provisions is guilty of a misdemeanor and subject to a fine of not more than $500.

More importantly, however, the Associations are concerned with the substantive question whether the individual states may constitutionally enact their own statutory schemes, no matter how well meant, affecting the operation,

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[2] ARTICLE III, SECTION 2: "The judicial Power [of the United States] shall extend * * * to all Cases of admiralty and maritime jurisdiction * * *."

structural alteration, inspection and maintenance of domestic and foreign vessels engaged in commerce on interstate or international waterways, whereas Appellants will presumably concentrate on the effect of the Michigan Act on Great Lakes shipping. The Associations and their members, on the other hand, are not only directly concerned with legislation affecting the Lakes, but seek to direct this Court's attention to the mushrooming of disparate and conflicting state water pollution statutes, all of which, in the Associations' view, contravene the Admiralty Clause.

This appeal presents an important question of constitutional law similar to that presented in *American Waterways Operators, Inc. et al.* v. *Askew et al.*,[3] wherein the 15 Associations were Intervening Plaintiffs. Unlike the court below in the case presently before this Court, a three judge court in *American Waterways* considered a water pollution statute of the State of Florida[4] and held it unconstitutional in its entirety, as in violation of the Admiralty Clause. A Notice of Appeal from this decision, dated December 22, 1971, has been filed by the State of Florida and the officers concerned, pursuant to 28 U.S.C. § 1253 and Rule 10 of this Court; under Rule 13 the appeal must therefore be docketed no later than March 9, 1972.

The Associations will of course be parties to the appeal, which will present squarely the basic constitutional question common to both appeals. The Associations therefore respectfully suggest the consolidation of the two appeals, in accordance with Rule 43.5 of this Court.

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[3] No. 71-156-Civ-J (M. D. Fla., December 10, 1971). A copy of the decision is annexed as Appendix A.

[4] The Florida Oil Spill Prevention and Pollution Control Act, Florida Laws of 1970, Ch. 376, 1970 Supplement to Florida Statutes, 1969 ("the Florida Act").

ARGUMENT

I.

The three-judge court below abused its discretion in declining to consider the constitutionality of the Michigan Watercraft Pollution Control Act.

The terms of the Michigan Act are so plain as to require no interpretation whatever by the Michigan courts. The sections with which the Associations are most vitally concerned are 4(2), 7(2) and 8. Sections 4(2) and 8, if held valid, would empower the State to require structural alterations of domestic and foreign vessels using Michigan waters and to inspect such vessels for compliance. Section 7(2), if upheld, would impose unlimited liability on vessel owners and operators for costs incurred by the State in removing discharges of oil and oily wastes. For the reasons hereinafter stated, the Associations maintain that the Michigan Act is an improper incursion into areas of maritime law wherein, under the Admiralty Clause, only Congress may validly legislate.

The court below found that following passage of the Michigan Act, state officers ". . . began its implementation by, first, enforcing the requirements relating to pleasure craft and then by approaching the owners and operators of Great Lakes cargo vessels in order to obtain compliance with the provisions of the Act."[5]

The court below further found that "As a result of the overtures of state officials, with the aim of establishing voluntary compliance within a reasonable time, some ship owners have installed holding tanks to control sewage discharge. . . ."[6]

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[5] Appendix A to Appellants' Jurisdictional Statement, p. 24.

[6] Appendix A to Appellants' Jurisdictional Statement, p. 25.

Nevertheless the court below, noting that no criminal prosecutions were pending or threatened "which would realistically infer that plaintiffs [Appellants] in a trial of a case would be denied the benefits of the Due Process and Equal Protection clauses or that a State court would not consider the other constitutional issues with circumspection and thoroughness in the usual and normal course,"[7] held that no justiciable controversy existed, and so declined to take up the merits of the case.

In so holding, the court applied the wrong yardstick; it ignored the frequently quoted definition of "controversy" found in *Aetna Life Ins. Co.* v. *Haworth,* 300 U.S. 227, 240-1 (1937):

> "A 'controversy' in this sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages." (*Citations omitted.*)

Lack of proof of an immediate threat of enforcement of a challenged statute has repeatedly been held no bar to a consideration of the merits of the case by this Court. *Pennsylvania* v. *West Virginia,* 262 U.S. 553 (1923); *Euclid*

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[7] Appendix A to Appellants' Jurisdictional Statement, p. 30.

v. *Ambler Co.*, 272 U.S. 365 (1926); *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936); *Currin* v. *Wallace*, 306 U.S. 1 (1939).

The court below did not suggest an answer to the puzzling question how the Michigan courts could consider a case which the three-judge court itself held did *not* present a justiciable controversy. In any event, this Court has frequently "... emphasized that abstention cannot be ordered simply to give state courts the first opportunity to vindicate [a] federal claim," *Zwickler* v. *Koota*, 389 U.S. 241, 251 (1967) and cases cited at pp. 250-2; a three-judge court has jurisdiction over all claims made against a state statute, where one of the claims presents a federal constitutional question. *Louis. & Nash. R. R. Co.* v. *Garrett*, 231 U.S. 298 (1913); *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73, 80-1 (1960).

II.

The Michigan Act violates the admiralty clause of the constitution and should for that reason be declared invalid.

A. Only Congress has the Power to Legislate in the Sphere wherein the Michigan Act Purports to Apply.

Almost 100 years ago this Court, in *The Lottawanna*, 88 U.S. (21 Wall.) 558 (1874), explained the purpose and meaning of the Admiralty Clause in the following frequently quoted language:

> "That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the

United States shall extend 'to all cases of admiralty and maritime jurisdiction'.

* * *

One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states." (pp. 574-575)

* * *

"The question as to the true limits of maritime law and admiralty jurisdiction is undoubtedly, as Chief Justice Taney intimates, exclusively a judicial question, and no State law or act of Congress can make it broader, or (it may be added) narrower, than the judicial power may determine those limits to be." (p. 576)

This Court has since held repeatedly that the Admiralty Clause, read in conjunction with the Necessary and Proper Clause,[8] vests in Congress the paramount power to enact legislation in the maritime field. *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917); *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149 (1920); *Washington* v. *Dawson & Co.*, 264 U.S. 219 (1924).

In the landmark *Jensen* case, *supra*, this Court held that a state workmen's compensation statute could not validly be applied to the death of a longshoreman resulting from an accident on board a vessel afloat in the navigable waters

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[8] CONSTITUTION, ARTICLE I, SECTION 8, CLAUSE 18: "The Congress shall have power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

of the State. In holding that state legislation may not contravene an applicable federal statute or affect the general maritime law, except within narrowly circumscribed limits, the Court cited *The Moses Taylor*, 71 U.S. (4 Wall.) 411 (1866), which struck down a state statute purporting to authorize proceedings *in rem* according to the practice in admiralty, and *The Roanoke*, 189 U.S. 185 (1903), holding that even before enactment of the Federal Maritime Lien Act,[9] maritime liens for materials furnished to foreign vessels could not validly be created by state statutes. Referring to state statutes in the maritime field, the Court said:

> ". . . [P]lainly, we think no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself. . . .
>
> A similar rule in respect to interstate commerce deduced from the grant to Congress of power to regulate it is now firmly established. 'Where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State into another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free.' *Bowman* v. *Chicago & Northwestern Ry. Co.*, 125 U.S. 465, 507, 508; *Vance* v. *Vandercook Co.*, 170 U.S. 438, 444; *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U.S. 311. And the same

[9] June 5, 1920, c. 250, § 30, subsections P-T, 41 Stat. 1006; 46 U.S.C. §§ 971-75 (1964).

character of reasoning which supports this rule, we think, makes imperative the stated limitation upon the power of the States to interpose where maritime matters are involved." (pp. 216-17).

Noting that the work of a longshoreman in loading a vessel is maritime in nature, and that the rights and liabilities arising from injuries sustained while engaged in such work are matters clearly within the admiralty and maritime jurisdiction of the United States, the Court continued:

> "If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other states may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded. * * *. The legislature exceeded its authority in attempting to extend the statute under consideration to conditions like those here disclosed. So applied, it conflicts with the Constitution and to that extent is invalid." (pp. 217-18).

The Court then stated that the remedy which the New York Workmen's Compensation Statute purported to give was of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and therefore not "saved to suitors" from the otherwise exclusive grant of admiralty jurisdiction to the federal district courts made by Section 9 of the Judiciary Act of 1789.[10]

Evidently acting in the belief that *Jensen* was based primarily on this Court's observation that workmen's com-

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[10] Sept. 24, 1789, c. 20, 1 Stat. 76; *as amended*, 28 U.S.C. § 1333 (1964).

pensation was not a common law remedy saved to suitors under the Judiciary Act, Congress promptly amended that statute so as to save to suitors, not only their common law remedies, but also any "rights and remedies under the Workmen's Compensation Law of any State". This amendment was, however, struck down by this Court in *Knickerbocker, supra,* where, after referring to its earlier decisions, including *Jensen,* the Court stated:

> "... The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal Government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.
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> * * *
>
> The field was not left unoccupied; the Constitution itself adopted the rules concerning rights and liabilities applicable therein; and certainly these are not less paramount than they would have been if enacted by Congress ". (253 U.S., at pp. 160-61)

The following are additional examples of the host of decisions of this Court holding that the States are just as powerless to contravene the general maritime law, as accepted by the federal courts, as they are to enact legislation in contravention of acts of Congress:

Chelentis v. *Luckenbach S.S. Co.,* 247 U.S. 372 (1918), holding that prior to passage of the Jones Act,[11] the

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[11] Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185, *as amended* June 5, 1920, c. 250, § 33, 41 Stat. 1007; 46 U.S.C. § 688 (1964).

general maritime law, and not state law, must be applied in actions for seamen's injuries, even if brought in state courts;

Garrett v. *Moore-McCormack Co.*, 317 U.S. 239 (1942), where this Court refused to apply Pennsylvania law, whereunder the burden of proving the invalidity of a release is on the releasor, in a Pennsylvania state court action for a seaman's injuries, and instead applied the general maritime law, whereunder one asserting a seamen's release as a defense has the burden of proving its validity;

Kossick v. *United Fruit Co.*, 365 U.S. 731 (1961), holding a state Statute of Frauds inapplicable to an oral guaranty allegedly given to a seaman by his employer;

Kermarec v. *Compagnie Generale*, 358 U.S. 625 (1959), applying the general maritime law, rather than the law of New York, to an injury sustained by a visitor on board a vessel in New York harbor;

Pope & Talbot, Inc. v. *Hawn*, 346 U.S. 406 (1953), holding that the general maritime law, whereunder contributory negligence does not bar a recovery, but is only considered in mitigation of damages, must be applied in suits for maritime injuries, regardless of the forum;

Moragne v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970), overruling *The Harrisburg*, 119 U.S. 199 (1886), and holding that the general maritime law affords a cause of action for wrongful death and that that law, rather than state law, must be applied in assessing liability for a death resulting from circumstances occurring within the admiralty jurisdiction.

It was against the background of these and similar decisions that a three-judge court in *American Waterways*,[12] (from which an appeal to this Court has been

[12] Note 3, p. 4, *supra;* Appendix A hereto.

noticed) held the Florida Oil Spill Prevention and Pollution Control Act[13] invalid as in contravention of the Admiralty Clause.

The State may argue that the Michigan Statute should be upheld under *Huron Cement Co.* v. *Detroit*, 362 U.S. 440 (1960) which involved a city ordinance whereunder shipowners were subject to a $100 fine and ships' officers to jail sentences of not exceeding 30 days for the emission of smoke from their vessels.

This Court found that ". . . the sole aim of the Detroit ordinance [was] the elimination of air pollution to protect the health and enhance the cleanliness of the local community", whereas the purpose of the federal statutes and regulations relating to boilers and propulsion and auxiliary machinery of sea-going vessels was ". . . to insure the sea-going safety of vessels subject to inspection". 362 U.S., at p. 445. The Court therefore concluded, Justices Douglas and Frankfurter dissenting, that the federal inspection laws and the ordinance did not "overlap", and that the federal laws therefore did not pre-empt the field. 362 U.S., at p. 446. The Court noted, however:

> "The scope of the privilege granted by the federal licensing scheme has been well delineated. A state may not exclude from its waters a ship operating under a federal license. *Gibbons* vs. *Ogden*, 9 Wheat. 1. A state may not require a local occupation license, in addition to that federally granted, as a condition precedent to the use of its waters. *Moran* vs. *New Orleans*, 112 U.S. 69. While an enrolled and licensed vessel may be required to share the costs of benefits it enjoys, *Huse* vs. *Glover*, 119 U.S. 543, and to pay fair taxes imposed by its domicile, *Transportation Co.* vs. *Wheeling*, 99 U.S. 273, it cannot be subjected to local license imposts exacted for the use of a navigable waterway, *Harman* vs. *Chicago*, 147 U.S. 396. See also *Sinnot* vs. *Davenport*, 22 How. 227".

[13] Note 4, p. 4, *supra*.

The Associations respectfully submit that *Huron,* which makes no mention of the Admiralty Clause, cannot be fully reconciled with the long line of decisions commencing with *The Lottawanna,* illustrations whereof are cited at pp. 8-12 *supra.* In any event the instant case plainly presents the "overlap" not found in *Huron,* for here federal laws and regulations were promulgated for the same purpose as the Michigan Act.

B. Congress has Exercised its Power by Legislating Extensively in the Sphere wherein the Michigan Act Purports to Apply; to that Extent the Act would be Unconstitutional, Even if it were Otherwise Valid.

1. *Federal Water Pollution Legislation.* Congress has been providing by statute for the prevention and minimization of water pollution, including pollution by vessels, since 1886. The federal statutes in the area, which supplement and to some extent alter the general maritime law applicable to water pollution, include The New York Harbor Act of 1886;[14] Rivers and Harbors Act of 1899;[15] Refuse Act of 1899;[16] Oil Pollution Act of 1924;[17] Water Pollution Control Compact Act;[18] Federal Water Pollution Control Act, as amended;[19] An Act to Implement the Provisions of the International Convention for the Prevention of the Pollution of the Sea by Oil;[20] The Clean Waters Restora-

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[14] *As amended,* 33 U.S.C. §§ 441-451b (1964).

[15] 33 U.S.C. §§ 403, 406 (1964).

[16] 33 U.S.C. § 407 (1964).

[17] 33 U.S.C. §§ 431-37 (1964); *repealed,* April 3, 1970, Pub. L. 91-224, Title I, § 108, 84 Stat. 113.

[18] July 31, 1947, c. 407, 61 Stat. 682-5.

[19] 33 U.S.C. §§ 1151-60 (1964).

[20] 33 U.S.C. §§ 1001-15 (1964).

tion Act of 1966,[21] and the Water Quality Improvement Act of 1970 ("W.Q.I.A.").[22]

The latest and most comprehensive of these statutes is W.Q.I.A., which provides, among other things, elaborate schemes for the control of vessel sewage [23] and oil pollution,[24] as well as for promulgation of regulations by the President concerning abatement of pollution by other hazardous substances.[25]

Despite the detailed and comprehensive regulatory scheme for the control of water pollution embraced in W.Q.I.A. and its antecedents, the State of Michigan, by enacting its own legislation, has sought to duplicate, contravene and contradict the provisions of the federal statutes, causing an intolerable burden upon international, interstate and intrastate maritime commerce.

Section 11(o)(2) of the Federal Water Pollution Control Act, as amended by W.Q.I.A.,[26] provides that "Nothing in this section shall be construed as pre-empting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such State." However, it is elementary that Congress cannot give to the States powers which they have surrendered to the Federal Government under the Constitution. *Knickerbocker Ice Co.* v. *Stewart*, 253

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[21] *As amended*, 33 U.S.C. §§ 1153, 1155-60 (1964).

[22] 33 U.S.C. §§ 1161-75 (1964). As of this writing, an extensive revision of W.Q.I.A. is under consideration by Congress. See, for example, Federal Water Pollution Control Act Amendments of 1971, S. 2770, 92d Cong. 1st Sess., passed by the Senate on Nov. 2, 1971.

[23] 33 U.S.C. § 1163 (1964).

[24] 33 U.S.C. § 1161 (1964).

[25] 33 U.S.C. § 1162 (1964).

[26] 33 U.S.C. § 1161(o)2 (1964).

U.S. 149, 160 (1920), *supra*, p. 11. Among the most important of these are the paramount power of Congress to legislate in the maritime field and the power of the federal judiciary to define the general maritime law which must prevail throughout all of the United States.

2. *Federal Legislation and International Agreements Concerning Inspection of Vessels.* Section 8 of the Michigan Act would, if valid, subject domestic and foreign vessels using Michigan waters to inspection by the Michigan Water Resources Commission, its agents, and inspectors, or any peace, conservation or police officer, for the purpose of determining whether it is equipped as § 4(2) of the Act requires.

Federal legislation,[27] together with the regulations issued pursuant thereto, set up a detailed and comprehensive scheme, administered by the United States Coast Guard, for inspection and regulation of all vessels (except motor boats, which are otherwise provided for) propelled by steam or any other form of mechanical or electrical power. This legislation covers foreign as well as domestic vessels "navigating any waters of the United States which are common highways of commerce or open to general or competitive navigation." All navigable waters of the State of Michigan, with the exception of land-locked lakes, are part of the navigable waters of the United States, and are thus included. *Ex Parte Boyer*, 109 U.S. 629 (1884). The federal scheme includes requirements for construction of vessels, their equipment and maintenance, and is in consonance with the 1960 International Convention on the Safety of Life at Sea [28] which has been ratified or adhered to by all maritime nations, including the United States, and which contains detailed requirements for the construction, maintenance and inspection of all seagoing vessels.

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[27] 46 U.S.C. §§ 361-436 (1964).

[28] TIAS 5780, 16 UST 185, 536 UNTS 27.

It is not only unconstitutional but totally impractical for the State of Michigan—or any other state—to attempt to set up its own inspection requirements for vessels trading to the state, in addition to the detailed scheme devised by the United States Government in cooperation with other maritime nations. The Michigan legislature apparently recognized the need for uniformity by enacting Section 9 of the Act, which reserves to the State the "exclusive right" to establish requirements in this area "in order to insure statewide uniformity." But Michigan, any more than any of its political subdivisions, is not an island unto itself. It is manifestly improper for Michigan, or any other state, or any political subdivision thereof, to enact its own—and conflicting—legislation in this field.

3. *The United States Limitation of Liability Act.* The United States Limited Liability Act (more commonly known as the "Limitation Statute"), Title 46 U.S.C. §§ 183-89, provides a scheme for limitation of the liability of a vessel owner or demise charterer for damage not caused with his "privity or knowledge."

By enacting W.Q.I.A., Congress effectively amended the Limitation Statute in respect of one class of claims, i.e., claims of the United States Government for the cost of cleaning up an oil spill which the shipowner is unable to prove was the result of a cause excepted under W.Q.I.A. (act of God, act of war, negligence of the United States Government, or act or omission of a third party). Under W.Q.I.A., United States Government claims for clean-up costs are not subject to the Limitation Statute governing other property claims. Instead, W.Q.I.A. sets up a separate "limitation fund" of $100 per gross ton (with a ceiling of $14,000,000) for the purpose of reimbursing the United States Government for clean-up costs. Title 33 U.S.C. § 1161(f)(1).

W.Q.I.A. thus substantially altered the pre-existing law of limitation of liability. What Congress itself could do,

however, the states are powerless to do; no state statute is valid if it contravenes the United States Limitation Statute. *Butler* v. *Boston Steamship Co.*, 130 U.S. 527 (1889); *Paladini* v. *Flink*, 26 F.2d 21 (9th Cir. 1928); *Loughin* v. *McCaulley*, 186 Pa. St. 517, 40 Atl. 1020 (S.Ct. Pa. 1898).

In *Loughin* v. *McCaulley, supra*, the Supreme Court of Pennsylvania held that the United States Limitation Statute was paramount over a provision of the Pennsylvania State Constitution purporting to prohibit limitations on the amount of recoveries for injuries resulting in death. The Court struck down the contention that the Limitation Statute could not prevail against the Pennsylvania constitutional provision, saying that it was "clear that neither statute nor constitution of Pennsylvania can be set up against a right given by congress in its control of the maritime law of the country. That control is paramount, and, when it has been exercised in a particular way, all state authority must conform to it."

It is plain from the decisions cited that Section 7(2) of the Michigan Act, insofar as it may purport to impose not only absolute liability, but liability without limitation as to amount, for the costs of removal of oil or oily wastes which have been discharged from vessels, is in contravention of the United States Limitation Statute, and would therefore be invalid and unenforceable, even if it were otherwise valid.

4. *The Boundary Waters Treaty between the United States and Canada.* Commercial vessels which ply the Great Lakes and the St. Lawrence Seaway fly the flags of all the maritime nations of the world, and the waters themselves form part of the territories of seven states of the United States and two provinces of Canada. There is no practical way that any single governmental entity, acting unilaterally without reference to the international aspects of the problem, can solve the ecological crisis, and any

attempts to do so made by individual states, even if constitutional (which they are not), would not only fail to solve it but would inevitably bring about a serious impairment of the essential water-borne commerce of the area concerned. It was undoubtedly in recognition of the fact that navigation of the Great Lakes cannot be controlled by one nation alone that in 1909 the United States and Great Britain entered into the Boundary Waters Treaty between the United States and Canada,[29] pursuant to which an International Joint Commission was set up and given jurisdiction in cases involving the use of the Great Lakes and related waters.

As the Boundary Waters Treaty is the supreme law of the land, and as the Michigan Act contravenes the Treaty, it would for that reason be invalid, even if the Admiralty Clause of the Constitution were non-existent. *United States* v. *Pink*, 315 U.S. 203, 230-31 (1942).

Conclusion

The Michigan Act contravenes a number of other provisions of the United States Constitution, including the Commerce Clause. However, its provisions pertaining to vessels are so manifestly in violation of the Admiralty Clause that an analysis of the other constitutional objections by these Amici Curiae is not considered necessary.

Michigan is but one of some 30 states which border upon, or have navigable outlets to the sea. A number of these have already enacted pollution legislation vitally affecting vessels. If the Michigan Act were permitted to stand, those States that have thus far refrained from enacting legislation of this sort would be almost certain to follow Michigan's example.

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[29] 36 Stat. 2448, TS 548; III *Redmond* 2616.

Michigan, Florida, Maine, Massachusetts, Rhode Island, Washington and other state pollution laws already enacted are by no means uniform. If vessel operators eventually had to contend with 30 state laws, as well as federal law, in this country alone, the results would be completely chaotic. Still more American shipowners would surely be added to the growing list of those who have been obliged to discontinue operations in recent years, and many foreign owners would reluctantly find it necessary to stop trading their ships to United States ports. The American public would be bound to suffer, as the end result would be shortages of oil and other products which depend on water transportation, and higher prices for such as might still be carried.

No responsible individual or company wants to see the marine environment spoiled. Every reasonable effort should be made to eliminate marine pollution or, at least, to keep it at an absolute minimum consistent with the public's demands for oil and the other water-borne products which have come to be considered necessities of modern life. Improvements in the design of ships and in the training of the officers and crews who man them, and improvements in the methods employed by governmental authorities, by the oil companies, and by vessel operators in coping with discharges of polluting substances will be of immense help, but it must be borne in mind that setting such standards with respect to United States flag vessels is a matter for national, and not for state or local regulation.

Insofar as foreign-going ships are concerned, it is plain that the setting of standards should be international in scope, and great progress has already been achieved in the movement to bring this about. Meanwhile, such regulation should be left to the Federal Government. To permit the states to enter the field would set the movement for international uniformity back many years, without any improvement whatever in the marine environment.

PRAYER

The Associations, as *Amici Curiae*, respectfully pray that this Court may, in the exercise of its discretion, set this appeal down for argument together with the appeal which has been noticed in *American Waterways Operators, Inc., et al.* v. *Askew, et al.*, and that after the hearing thereof it may reverse the decision of the United States District Court for the Eastern District of Michigan and remand the case, with instructions to enter a decision in favor of Appellants.

Dated: January 20, 1972.

Respectfully submitted,

NICHOLAS J. HEALY,
GORDON W. PAULSEN,
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HAIGHT, GARDNER, POOR & HAVENS
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of Counsel

CERTIFICATE OF SERVICE

We, Nicholas J. Healy and Gordon W. Paulsen, members of the bar of this Court, hereby certify that on the 21st day of January, 1972, we served copies of the foregoing Motion and Brief *Amici Curiae* on the several parties hereto, as follows:

On Appellants Lake Carriers' Association and American Steamship Company *et al.*, by mailing three copies thereof to their Attorney, Scott H. Elder, Esq., addressed to him at 2700 Terminal Tower, Cleveland, Ohio 44113.

On Appellees Ralph A. MacMullan, Individually and as Director, Michigan Department of Natural Resources, *et al.*, by mailing three copies thereof to their attorneys, Hon. Frank J. Kelley, Attorney General of the State of Michigan, Stewart H. Freeman, Esq., Assistant Solicitor General, and Jerome Maslowski, Esq. and Francis J. Carrier, Esq., Assistant Attorneys General addressed to them at 630 Seven Story Building, 525 West Ottawa Street, Lansing, Michigan 48913.

Dated: New York, N. Y.
January 21, 1972

NICHOLAS J. HEALY

GORDON W. PAULSEN
Attorneys for Movants,
Assuranceforeningen Gard, *et al.*

APPENDIX A

[Memorandum Opinion and Final Judgment in American Waterways Operators, *et al.* v. Askew, *et al.*, 71-156-CIV-J (M.D. Fla., Dec. 10, 1971)]

Appendix A

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

JACKSONVILLE DIVISION

THE AMERICAN WATERWAYS OPERATORS, INC., a Delaware corporation; GULF ATLANTIC TOWING CORPORATION, a Florida corporation; GLIDDEN-DURKEE, a division of SCM, CORPORATION, a New York corporation; DIXIE CARRIERS, INC., a Delaware corporation; OIL TRANSPORT COMPANY, INCORPORATED, a Louisiana corporation; NATIONAL MARINE SERVICE, INC., a Delaware corporation; THE REVILO CORPORATION, a Florida corporation; EASTERN SEABOARD PETROLEUM COMPANY, INC., a Florida corporation; NILO BARGE LINE, INC., a Delaware corporation; STEUART TRANSPORTATION COMPANY, a Delaware corporation; INTERSTATE OIL TRANSPORT COMPANY, a Delaware corporation; FEDERAL BARGE LINES, INC., a Delaware corporation; GULF CANAL LINES, INC., a Texas corporation; and INGRAM OCEAN SYSTEM, INC., a Delaware corporation, all authorized to do business in the State of Florida,

Plaintiffs,

and

SUWANNEE STEAMSHIP CO., a Florida corporation; COMMODORES POINT TERMINAL CORPORATION, a Delaware corporation; AMERICAN INSTITUTE OF MERCHANT SHIPPING; ASSURANCE FORENINGEN GARD; ASSURANCE FORENINGEN SKULD; THE BRITANNIA STEAM SHIP INSURANCE ASSOCIATION, LIMITED; THE JAPAN SHIP OWNERS MUTUAL PROTECTING AND INDEMNITY ASSOCIATION; THE LIVERPOOL AND LONDON STEAM SHIP PROTECTION AND INDEMNITY ASSOCIATION, LIMITED; THE LONDON STEAM-SHIP OWNERS' MUTUAL INSURANCE ASSOCIATION, LIMITED; NEWCASTLE PROTECTION AND INDEMNITY ASSOCIATION; THE NORTH OF ENGLAND PROTECTING & INDEMNITY ASSOCIATION, LIMITED; THE STANDARD STEAMSHIP OWNERS' PROTECTION & INDEMNITY ASSOCIATION; THE STANDARD STEAMSHIP OWNERS' PROTECTION AND INDEMNITY ASSOCIATION (BERMUDA), LIMITED; THE STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION, LIMITED; SUNDERLAND STEAMSHIP PROTECTING AND INDEMNITY ASSOCIATION; SVERIGES ANGFARTYGS ASSURANSFORENING; THE UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION (BERMUDA), LIMITED; THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG); and their respective members,

Intervening Plaintiffs,

against

REUBIN O'D. ASKEW, as Governor of the State of Florida; RICHARD B. STONE, as Secretary of State of the State of Florida; ROBERT L. SHEVIN, as Attorney General of the State of Florida; FLOYD T. CHRISTIAN, as Commissioner of Education of the State of Florida; DOYLE E. CONNER, as Commissioner of Agriculture of the State of Florida; FRED O. DICKINSON, JR., as Comptroller of the State of Florida; THOMAS D. O'MALLEY, JR., as Treasurer of the State of Florida; as and constituting THE DEPARTMENT OF NATURAL RESOURCES, State of Florida; RANDOLPH HODGES, as Executive Director, and TOM SIMPSON, as Conservation Officer of Duval County, DEPARTMENT OF NATURAL RESOURCES, State of Florida; and THE STATE OF FLORIDA,

Defendants.

Appendix A

MEMORANDUM OPINION AND FINAL JUDGMENT

Before, RONEY, *Circuit Judge,* and SCOTT and TJOFLAT, *District Judges.*

TJOFLAT, *District Judge*:

During the 1970 session the Florida Legislature passed the "Oil Spill Prevention and Pollution Control Act" [1] (hereinafter called the "Florida Act") in an attempt to prevent pollution by the shipping industry of waters within the territorial jurisdiction of the State of Florida. The Act imposes unlimited liability without fault upon virtually any vessel which discharges oil or any other pollutant while destined for or leaving any Florida port.[2] Onshore and offshore terminal facilities are subject to the same liability.[3] The Act requires every owner or operator of a vessel using a Florida port or a terminal facility to pay whatever cleanup costs or damages may result from the discharge of pollutants [4] and to maintain satisfactory evidence of financial responsibility to satisfy such liability.[5] The Department of Natural Resources is empowered to require any vessel transporting a pollutant in state waters to be equipped with specified containment gear and a crew trained in its use.[6] Prior to entering a Florida port, every vessel is subject to inspection by the port manager to determine the presence of the required container gear and the seaworthiness of the ship.[7] He is required to notify all other ports in the state of any vessel refused entry to his port.[8]

Plaintiffs and intervenors include merchant shippers whose vessels use Florida ports in the course of transporting goods in foreign and interstate commerce; world shipping associations who insure three-fourths of the ocean-going tonnage against, among other things, liability for

oil spillage; a substantial portion of the barge and towing industry operating along the Florida coast; and owners of oil terminal facilities located in Florida ports. They have challenged the validity of the Florida Act on several federal constitutional grounds. Plaintiffs' initial contention is that Florida has sought to legislate substantive maritime law which, under the United States Constitution, is exclusively within the federal domain. Secondly, they contend that the Act violates the Commerce Clause, since it seeks to regulate foreign and interstate commerce. Certain provisions of the Act are under piecemeal attack on Fourteenth Amendment due process and equal protection grounds. The resolution of the first of these contentions dictates the decision in this case, and the others will not be discussed.

The maritime law of the United States has evolved under Article 3, Section 2, of the Constitution which extends the judicial power of the United States "to all Cases of admiralty and maritime jurisdiction." In a territorial sense that jurisdiction covers all waters navigable in interstate or foreign commerce, including state waters.[9] Maritime law governs virtually every facet of the shipping industry from the design and construction of vessels to the regulation of their day to day operations and the transactions in which they engage. It comprises traditional admiralty rules and concepts found initially in the European authorities. These rules and concepts have been augmented from time to time by the federal judiciary to accommodate needs distinctive to this nation. Further changes in the corpus of maritime law have been effected by a variety of congressional enactments and administrative regulations.[10] One of these congressional enactments is the Water Quality Improvement Act of 1970[11] (hereinafter called "W.Q.I.A.") which became law a few months prior to the effective date of the Florida Act. W.Q.I.A. provides plaintiffs with tangible evidence that the

Florida Act is an unconstitutional intrusion into the federal maritime domain.

The W.Q.I.A. reinforces the national anti-water pollution policy. In this act Congress declared that there should be no discharge of oil into or upon the navigable waters and shorelines of the United States.[12] The owner or operator of a vessel or an onshore or offshore facility is subject to limited liability without fault for the costs expended by the government in cleaning up an oil spill.[13] Where the spillage results from willful negligence or misconduct, however, liability for such costs can be unlimited.[14] Evidence of financial responsibility sufficient to cover its potential liability must be given by any vessel of 300 gross tons or more that uses the navigable waters of the United States.[15] Additionally, the President is authorized to issue regulations requiring, among other things, that vessels maintain oil spill prevention equipment and be subject to boarding for inspection purposes at any time.[16]

In adopting W.Q.I.A. Congress anticipated that all hazardous substances, in addition to oil, capable of polluting navigable waters would be subject to similar legislative treatment.[17] W.Q.I.A. required the President to promulgate regulations defining such hazardous substances and establishing methods and means for their removal.[18] He was also required to report to Congress, by November 1, 1970, on the desirability of enacting legislation to establish liability for the cost of removing hazardous substances discharged from vessels and onshore and offshore facilities.[19]

That the Florida Act constitutes unlawful intrusion into the exclusive federal admiralty domain is apparent when one observes the extent to which that act would change substantive maritime law. The most obvious changes would be in the liability now imposed by W.Q.I.A. and maritime rules on shippers and the operators of onshore and offshore facilities.

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While both W.Q.I.A. and the Florida Act subject vessels and onshore and offshore facilities to strict liability for cleanup costs, the latter imposes a far greater measure of responsibility. For example, W.Q.I.A. would excuse a shipper who demonstrates that the oil spill was caused by act of God, an act of war, or the act or omission of a third party.[20] The Florida Act recognizes none of these defenses to a claim by the state for cleanup costs. The state is entitled to judgment simply by pleading and proving "the fact of the prohibited discharge." [21] Moreover, the amount of the recovery would be unlimited; whereas W.Q.I.A. would place a limit on exposure, as we have previously noted.[22]

There is perhaps an even greater contrast between maritime law and the Florida Act in compensating state or private interests for property damage, as distinguished from cleanup costs. W.Q.I.A. creates responsibility for cleanup costs only and leaves undisturbed the remedies available under maritime law for private injury caused by oil spillage or other pollution. The federal courts have long considered oil pollution as a maritime tort for which damages may be awarded.[23] Compensation is recoverable for injury to property and allowances have even been made for consequential damages. In *In re New Jersey Barging Corp.*,[24] an oil spill case, the court approved the following language from the Commissioner's report:

> In the light of the . . . authorities, it would seem to the Commissioner that he is authorized, and in fact required, to make award of compensation for such annoyance, inconvenience and discomfort suffered by particular claimants to the extent of and in an amount commensurate with the annoyance and discomfort proven.

The recovery of damages in such cases is predicated on proof of negligence or unseaworthiness. The owner of a

seaworthy vessel would not be liable, for example, if he encountered an extraordinary peril which resulted in a non-deliberate and non-negligent pollution of the shoreline. Even if fault were established, the vessel owner's financial responsibility for property damage would be limited to the value of the vessel at the end of the voyage, plus the "freight then pending," unless the damage was caused with the owner's "privity or knowledge." [25]

Under the Florida Act, however, liability without fault is the foundation for "damage incurred by the state and for damage resulting from injury to others", just as it is in the case of cleanup costs. By substituting absolute liability for proof of negligence or unseaworthiness as a condition to unlimited recovery, the Florida Act, if valid, would materially change the substantive maritime law governing the disposition of claims arising from the pollution of coastal waters.

It is well settled that state legislation is invalid where it is in contravention with general admiralty rules or congressional enactments in the maritime field. In the landmark *Jensen* case,[26] the Supreme Court, in holding that the New York State Workmen's Compensation Statute could not constitutionally be applied where an accidental death occurred on a vessel afloat in navigable waters within New York's boundaries, said:

> And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamen-

tal purposes for which such law was incorporated into our national laws by the Constitution itself.[27]

* * *

> If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other States may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded. . . . The legislature exceeded its authority in attempting to extend the statute under consideration to conditions like those here disclosed. So applied, it conflicts with the Constitution and to that extent is invalid.[28]

The Florida Act here constitutes a far greater intrusion into the federal maritime domain than the New York statute in the *Jensen* case. If applied to the plaintiffs and intervenors in this case, the Florida Act would effect—in the words of *Jensen*—the "destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded".

This is not a situation in which a state legislature has sought to act in an area of purely local concern and its enactment is no real encroachment on federal interests. Rather, this is a case where the State purports to impose upon shipping and related industries duties which under the federal law they do not bear. It can hardly be said that Florida is not seeking to regulate conduct in the federal maritime jurisdiction. We need not belabor the point that to permit the states severally to regulate these

industries as Florida seeks to do would sound the death knell to the principle of uniformity.

Defendants argue that, to the extent the Florida Act goes beyond W.Q.I.A., it fills a "void" in the maritime law and is justifiable under the "gap theory".[29] This theory presupposes that maritime law is an incomplete system, with numerous gaps that can be filled by state statutes. This is to say, if the maritime law affords no remedy, the states may provide one. The Supreme Court's recent decision in *Moragne* v. *States Marine Lines, Inc.*[30] clearly puts such a theory to rest.

In that case the Court had before it the question of the applicability of the Florida Wrongful Death Statute[31] to a claim arising out of the death of a longshoreman killed while working aboard a vessel in navigable waters within the State of Florida. Neither the general maritime law nor Congressional enactment provided a remedy in the situation. The District Court and the Court of Appeals, citing *The Tungus* v. *Skovgaard,*[32] held that the state statute should be invoked to provide the remedy as well as the basis for recovery, that is, negligence.

Under maritime law, however, States Marine Lines owed plaintiff's decedent the duty to provide a seaworthy vessel in addition to the duty to exercise due care. Plaintiff therefore argued that an action was maintainable for a breach of either duty.

The Supreme Court rejected the notion that the absence of a federal statute or a maritime rule on the subject compelled the conclusion that state law must govern. It held that admiralty was fully capable of fashioning a remedy for the breach of substantive duties imposed by general maritime law and thus directed the district court to shape the remedy on remand. At the same time the Court observed that the Florida law of negligence has no place in the maritime field. The decision clearly re-

inforced the policy of uniformity and is an indication that admiralty cannot tolerate the inconsistency inherent in accommodating state remedial statutes to exclusively maritime substantive concepts.

Another argument advanced by defendants is that the Florida Act is valid under the following provision of W.Q.I.A.:

> Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such State. 33 U.S.C. § 1161(o)(2).

It has long been recognized that Congress is powerless to confer on the states authority to legislate within the admiralty jurisdiction [*Knickerbocker Ice Company* v. *Stewart*, 253 U.S. 149 (1920);[33] *The Lottawanna*, 21 Wall. 558 (1875); *The Steamer St. Lawrence*, 1 Bl. 522 (1862)] and we cannot presume that W.Q.I.A. was an attempt to do so. There is nothing in the language of the act which purports to grant any such legislative authority to the states. The statement that Congress did not intend to preclude state imposed liability for oil pollution simply means that the states are free to enforce pollution control measures that are within their constitutional prerogative.

For the foregoing reasons we conclude that the Florida Act in question cannot constitutionally be applied to the plaintiffs and intervenors and to the activities in which they engage. The question thus arises as to whether the Act is severable. Although it contains a severability clause,[34] such a provision is by no means binding on a court empowered to determine the constitutionality of a statute. The rule was explained by the Supreme Court in *Carter* v. *Carter Coal Co.*:[35]

> Whether the provisions of a statute are so interwoven that one being held invalid the others must

> fall, presents a question of a statutory construction and of legislative intent, to the determination of which the statutory provision becomes annexed. "But it is an aid merely; not an inexorable command." *Dorchy* v. *Kansas*, 264 U.S. 286, 290. The presumption in favor separability does not authorize the court to give the statute "an effect altogether different from that sought by the measure viewed as a whole." *Railroad Retirement Bd.* v. *Alton R. Co.*, 295 U.S. 330, 362.
>
> The statutory aid to construction in no way alters the rule that in order to hold one part of a statute unconstitutional and uphold another part as separable, they must not be mutually dependent upon one another.

When a federal court is called upon to rule on the constitutionality of a state statute containing a severability clause, the court will look to the decisions of the state court on the effect of such a clause.[36] In *Cramp* v. *Board of Public Instruction*[37] the Supreme Court of Florida made the following pronouncement on the question of severability:

> The rule is well established that the unconstitutionality of a portion of a statute will not necessarily condemn the entire act. When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.[38]

In the Florida Act there are no provisions which, though standing by themselves might be considered unob-

jectionable, are not so interwoven in purpose and scheme with the invalid provisions of the Act as to permit the operation of the severability clause. The announced intent of the Florida Legislature was to "deal with the hazards and threats of danger and damage posed by . . . transfer of pollutants between vessels, between onshore facilities and vessels, and between offshore facilities and vessels within the jurisdiction of the state and state waters. . . ." [39] Each provision of this statute was enacted to realize this intent and each would affect the industries in which plaintiffs and intervenors engage. The provisions that do not directly frustrate the federal maritime law are so few that, considered together, they would not comprise a coherent legislative scheme. Accordingly, the Act in its entirety must fall.

In consideration of the foregoing, it is

ORDERED:

1. Chapter 70-244, Laws of Florida, as amended in Chapter 376, Florida Statutes Annotated, is hereby declared to be in violation of Article III, Section 2, Clause 3 of the Constitution of the United States and is therefore null and void and without effect.

2. The temporary restraining order entered by Judge Charles R. Scott on March 19, 1971, enjoining the enforcement of said chapter and any regulations promulgated thereunder is hereby made permanent; provided that nothing in this final judgment shall be construed to prohibit the defendants from continuing to pay salaries of current employees out of the Coastal Protection Trust Fund.

3. This memorandum opinion and final judgment shall constitute the final judgment of this Court as to all issues presented in this action.

DONE and ORDERED at Jacksonville, Florida, this 10th day of December, 1971.

GERALD B. TJOFLAT
United States District Judge
For the Court

Appendix A

FOOTNOTES

[1] Chapter 376, Florida Statutes Annotated; Chapter 70-244, Laws of Florida (all further citations to the act will be to Florida Statutes Annotated).

[2] Section 376.12, Florida Statutes Annotated, provides in part:

> Liabilities of licensees.—Because it is the intent of this chapter to provide the means for rapid and effective cleanup and to minimize damages, any licensee and its agents or servants, including vessels destined for or leaving a licensee's terminal facility, who permits or suffers a prohibited discharge or other polluting condition to take place within state boundaries shall be liable to the state for all costs of cleanup or other damage incurred by the state and for damages resulting from injury to others. In any suit to enforce claims of the state under this chapter, it shall not be necessary for the state to plead or prove negligence in any form or manner on the part of the licensee or any vessel. If the state is damaged by a discharge prohibited by this chapter it need only plead and prove the fact of the prohibited discharge or other polluting condition and that it occurred.

"'Pollutants' shall include, but not be limited to, oil of any kind and in any form, gasoline, pesticides, ammonia, chlorine, and other hazardous materials." Fla. Stat. Ann. § 376.031(7)

[3] Terminal facilities and vessels are defined as:

> "Terminal facility" means any water front facility of any kind, other than vessels not owned or operated by such facility, and related appurtenances located on land, including submerged lands, or on or under the surface of any kind of water, which facility and related appurtenances are used or capable of being used for the purpose of drilling for, pumping, storing, handling, transferring, processing, or refining oil or other pollutants, including, but not limited to, any such facility and related appurtenances owned or operated by a public utility or a governmental or quasi-governmental body. A vessel shall be considered a terminal facility only in the event of a ship-to-ship transfer of oil, petroleum products or their by-products, and other pollutants, and only that vessel going to or coming

from the place of transfer and the terminal facility. With respect solely to application fees for licenses and annual license fees as required in this act, the words "terminal facility" shall not be construed to include the fuel storage tanks or other facilities of any marine service station having no more than twelve hundred (1200) gallons of pollutants in storage on the premises. Fla. Stat. Ann. § 376.031(9) as amended, Laws of Florida, 71-243.

"Vessel" includes every description of watercraft or other contrivance used, or capable of being used, as a means of transportation on water, whether self-propelled or otherwise, and includes barges and tugs. Fla. Sta. Ann. § 376.031(12).

[4] See note 2, *supra*.

[5] Section 376.14, Florida Statutes Annotated, provides, in part:

(1) Each owner or operator of a terminal facility or vessel, including any barge, using any port in Florida shall establish and maintain under rules and regulations prescribed by the department of natural resources, evidence of financial responsibility based on the capacity of the terminal facility or tonnage of the ship, the cargo carried, and other similar factors to which the vessel could be subjected under this chapter. Financial responsibility may be established and maintained by any one (1), or a combination, of the following methods acceptable to the department:

(a) Evidence of insurance;

(b) Surety bonds payable to the governor of the state, conditioned to pay all costs and expenses of the cleanup of any discharge as well as damages caused to the state and any person;

(c) Qualification as a self-insurer; or

(d) Other evidence of financial responsibility satisfactory to the department.

(2) A bond filed with the department shall be issued by a bonding company authorized to do business in the state.

(3) Any claim for costs incurred by a terminal facility or vessel may be brought directly against the insurer or any other

person providing evidence of financial responsibility. Any claim for costs of cleanup, civil penalties, or damages by the state, and any claim for damages by any injured person, may be brought directly against the bond, the insurer, or any other person providing evidence of financial responsibility.

[6] Section 376.07, Florida Statutes Annotated, provides in part:

Regulatory powers of department. —The department shall from time to time adopt, amend, repeal, and enforce reasonable regulations insofar as they relate to oil spills or discharges or the spills or discharges of other pollutants into the waters of this state or onto the coasts of this state.

(1) The regulations shall be adopted in accordance with the administrative procedure act, chapter 120.

(2) The department shall adopt regulations including, but not limited to, the following matters:

(a) Operation and inspection requirements for facilities, vessels, personnel, and other matters relating to licensee operations under this chapter, and specifically requiring that vessels transporting pollutants within state waters shall maintain on board such containment gear as may be required by the department with a crew trained in the use of the gear.

(b) Procedures and methods of reporting discharges and other occurrences prohibited by this chapter.

(c) Procedures, methods, means, and equipment to be used by persons subject to regulation by this chapter in the removal of pollutants.

* * *

(f) Requirements for minimum weather and sea conditions for permitting a vessel to enter port and for the safety and operation of vessels, barges, tugs, motor vehicles, motorized equipment, and other equipment relating to the use and operation of terminals, facilities, and refineries, the appproach and departure from terminals, facilities, and refineries and requirements that containment gear approved by the department be on hand and maintained by terminal facilities and refineries with adequate personnel trained in its use.

(g) Requirements that, prior to being granted entry into any port in this state, the master of a vessel shall report:

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(1) Any discharges of oil or other pollutants the vessel has had since leaving the last port;

(2) Any mechanical problem on the vessel which creates the possibility of a spill; and

(3) Any denial of entry into any port during the current cruise of the vessel.

[7] Section 376.08(2), Florida Statutes Annotated, provided:

The port manager shall have the authority to board any vessel prior to its entry into port in order to ascertain the seaworthiness of the vessel and the presence of required containment gear. Upon being notified of a discharge the port manager shall have authority to direct the vessel to anchor immediately or move to a specific dock and deploy containment gear or to move to the open seas and to take such other measures as he deems necessary. The port manager shall have the additional duty to inspect any terminal facility in his port to determine that adequate containment gear is on hand at the terminal facility.

[8] Section 376.08(3), Florida Statutes Annotated, provides:

A port manager who refuses entry of any vessel into the port under his charge shall be required to notify all other ports in the state of his refusal of entry of that vessel.

[9] "[T]he admiralty jurisdiction of the United States extends to all waters, salt or fresh, with or without tides, natural or artificial, which are in fact navigable in interstate or foreign water commerce, whether or not the particular body of water is wholly within a state, and whether or not the occurrence or transaction that is the subject matter of the suit is confined to one state." *Gilmore and Black, The Law of Admiralty*, § 1-11, at 28-29 (1957) and cases cited therein.

Arguably, this would include land-locked lakes which are "navigable-in-fact" in interstate commerce.

[10] The "Necessary and Proper Clause" of the United States Constitution (Article I, Section 8, Clause 18), read in context with the "Admiralty Clause" (Article III, Section 2, Clause 3) confers upon

Congress the power to enact legislation in the maritime field. *Knickerbocker Ice Company* v. *Stewart*, 253 U.S. 149 (1920); *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917).

[11] 33 U.S.C. § 1161 *et seq.*

[12] 33 U.S.C. § 1161(b)(1).

[13] The amount of liability of a vessel is limited to $100 per gross ton or $14,000,000, whichever is less. The liability of an onshore or offshore facility is limited to $8,000,000. 33 U.S.C. § 1161(f)(1), (2) and (3).

At the same time the Steamboat Inspection Act, together with the regulations issued pursuant thereto, sets up a detailed and comprehensive scheme, administered by the United States Coast Guard for maintenance, inspection, and regulation of all vessels (except motor boats, which are otherwise provided for) propelled in whole or in part by mechanical or electrical power in the navigable waters of the United States. 46 U.S.C. §§ 361-62. The Federal scheme is in consonance with the International Convention for the Safety of Life at Sea, 1960, T.I.A.S., 16 U.S.T. 185, 536 U.N.T.S. 27, which has been ratified or adhered to by all maritime nations, including the United States. Here again, conflict between the regualtions under the Florida Act and the federal law appears unavoidable.

[23] *See, e.g., Fireman's Fund Ins. Co.* v. *Standard Oil Co.*, 339 F.2d 148 (9th Cir. 1964); *Salaky* v. *Atlas Barge No. 3*, 208 F.2d 174 (2nd Cir. 1953); *California* v. *The Bournemouth*, 307 F.Supp. 922 (C.D. Cal. 1969); *Petition of New Jersey Barging Corp.*, 168 F.Supp. 925 (S.D.N.Y. 1958). Since the Congressional enactment of the Admiralty Extension Act in 1948 (46 U.S.C. § 740) "all cases of damage or injury, to person or property, caused by a vessel on navigable water, *notwithstanding that such damage or injury be done or consummated on land*" (emphasis added) are considered maritime torts and thus within the admiralty jurisdiction. *Petition of New Jersey Barging Corp., supra.*

[24] 168 F.Supp. 925, 937 (S.D.N.Y. 1958).

[25] United States Limited Liability Act, 46 U.S.C. § 183 *et seq.* No state statute can override this "Limitation Statute" within the

territorial jurisdiction of the federal maritime law. In *Butler* v. *Boston & Savannah Steamship Co.*, 130 U.S. 527, 555 (1889), the Supreme Court observed:

> "The law of limited liability, as we have frequently had occasion to assert, was enacted by Congress as a part of the maritime law of this country, and therefore it is co-extensive, in its operation, with the whole territorial domain of that law."

In holding that a Massachusetts wrongful death action, arising from a death occurring in the admiralty jurisdiction, was subject to the "Limitation Statute", the Court went on to say:

> "It is unnecessary to consider the force and effect of the statute of Massachusetts over the place in question. Whatever force it may have in creating liabilities for acts done there, it cannot neutralize or affect the admiralty or maritime jurisdiction or the operation of the maritime law in maritime cases. Those are matters of national interest. If the territory of the state technically extends a marine league beyond the seashore, that circumstance cannot circumscribe or abridge the law of the sea." 130 U.S. at 557-58.

[26] *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917).

[27] *Id.* at 216.

[28] *Id.* at 217-18.

[29] *See*, Currie, *"Federalism and the Admiralty," The Supreme Court Review 1960*, 158 at 166-73.

[30] 398 U.S. 375 (1970).

[31] Fla. Stat. Ann. § 768.01.

[32] 358 U.S. 588 (1959).

[33] In the *Knickerbocker* case the Court, speaking to the question of state legislative authority in the maritime field, said:

> "The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general

maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. *Moreover, it took from the States all power, by legislation or judicial decision,* to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations." 253 U.S. at 160-61. (Emphasis added).

[34] Laws of Florida, 70-244 § 23.

[35] 298 U.S. 238, 313 (1936).

[36] *Watson* v. *Buck*, 313 U.S. 387 (1941).

[37] 137 So.2d 828 (Fla. 1962).

[38] *Id.* at 830.

[39] Fla. Stat. Ann. § 376.021(3)(a), (4)(a).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-422

LAKE CARRIERS' ASSOCIATION and
AMERICAN STEAMSHIP COMPANY, et al.,
Appellants,
vs.
RALPH A. MacMULLAN, Individually and as Director
Michigan Department of Natural Resources, et al.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

BRIEF OF DOMINION MARINE ASSOCIATION AMICUS CURIAE

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

BRIEF OF DOMINION MARINE ASSOCIATION AMICUS CURIAE

By written consent of Appellants and Appellees filed separately with this brief, Dominion Marine Assocation files this brief as *amicus curiae*.

INTEREST OF THE AMICUS CURIAE

Dominion Marine Association is an organization incorporated under the laws of the Dominion of Canada and located in Ottawa. The Association represents Canada's inland waters and coastal shipping fleet consisting of approximately 175 vessels of Canadian registry. Its member firms own and operate in the aggregate vessel tonnage in excess of 2,000,000 tons representing a total capital investment in excess of $500,000,000.00. The Association and its 21 member companies[1] will be as directly affected by the Michigan Watercraft Pollution Control Act of 1970 (Act 167, P. A. Mich. 1970; C.L. '48 §323.331, MSA §3.533 (201) et seq.) as will appellants.

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[1] Algoma Central Railway, Sault Ste. Marie, Ont.
Carryore Limited, Westmount, P.Q.
Imperial Oil Limited, Toronto, Ont.
Mohawk Navigation Company Limited, Winnipeg, Man.
Papachristidis Shipping Limited, Montreal, P.Q.
Westdale Shipping Ltd., Port Credit, Ont.
Transit Tankers and Terminals Limited, Montreal, P.Q.
Canada Cement Lafarge Limited, Montreal, P.Q.
Hall Corporation (Shipping) 1969 Ltd., Montreal, P.Q.
N. M. Paterson & Sons Limited, Fort William, Ont.
Scott Misener Steamships Limited, Port Colborne, Ont.
Shell Canada Limited, Toronto, Ont.
Upper Lakes Shipping Limited, Toronto, Ont.
Canada Steamship Lines Limited, Montreal, P.Q.
Hindman Transportation Company Limited, Owen Sound, Ont.
Gulf Oil Canada Limited, Toronto, Ont.
National Sand & Material Company, Toronto, Ont.
Quebec & Ontario Transportation Company Limited, Montreal, P.Q.
Texaco Canada Limited, Montreal, P.Q.
Yankcanuck Steamships Limited, Sault Ste., Marie, Ont.

ARGUMENT

The Association and its members are vitally concerned with the waters of the Great Lakes and the St. Lawrence Seaway. They are concerned not only with the navigability of such waters but with the quality as well. These members are engaged in the business of providing vessel transportation of cargo throughout the Great Lakes and the St. Lawrence Seaway. They not only make extensive use of the waters of the Great Lakes for the purpose of carrying essential raw materials, but in the course of such transportation also use considerable quantities of such waters for the personal needs of crew members of vessels. And the individuals employed by member companies living, as they do, in the Great Lakes—St. Lawrence area share every human's desire for environmental protection and ecological preservation. In the course of their businesses many, indeed most, of the vessels owned and operated by the members of the Association necessarily traverse the territorial waters not only of the State of Michigan, but also of the other seven states and two Canadian provinces bordering the Great Lakes-St. Lawrence System.

As substantial users of the water of the Great Lakes-St. Lawrence System the members of the Dominion Marine Association recognize, as all of us must, that over years of abuse from many sources pollution of the Great Lakes has occurred to a shocking extent and that a broad-based, frontal attack on the problem is needed to reverse the trend and hopefully save the Lakes. They recognize also that while the trend perhaps can be reversed overnight, the problems of Great Lakes pollution cannot be cured overnight. Practical, economically feasible, uniform and fair solu-

tions within the limits of available technology are required. In the zeal to make the environment right, however, factories cannot be closed by regulation adopted today because they emit smoke tomorrow. Time and technology, as well as regulation, are a necessary, indeed Constitutional, part of the cure.

The State of Michigan in its desire for clean water, rather than attacking the problem by comprehensive legislation addressed to all forms of pollution, has singled out one source—watercraft—by its Michigan Watercraft Pollution Control Act of 1970, (Act 167, Public Acts 1970, C.L. '48, §323.331, M.S.A. §3.533 (201) et seq.). Insofar as the discharge of vessel sewage is concerned, that Act seeks to prohibit discharge of sewage from commercial vessels, "domestic or foreign", into Michigan waters and to require such vessels to be equipped with holding tanks or incinerating devices. Holding tanks are then to be emptied into shoreside disposal facilities, admittedly non-existent at the present time.

Dominion Marine Association firmly believes, however, that the proper attack on Great Lakes pollution generally and vessel sewage specifically from a Constitutional and practical standpoint can only come at the international, diplomatic level of the governments of both the United States and Canada, perhaps through the machinery of the International Joint Commission ("IJC"), already hard at work on the problem acting under the Boundary Waters Treaty between the United States and Canada of 1909, 36 Stat. 2448, Treaty Series No. 548.

> "There is no doubt that contaminants entering Lake Erie and Lake Ontario from one country move across the boundary and affect the water quality in the other country. Extensive current metre surveys, the movements of drift objects and the uniform dis-

tribution of chemicals in the waters of both lakes attest to that fact."[2]

If not international, then at the very least the regulation of commercial ship waste disposal is national in scope requiring uniformity of standard and regulation. For this reason Dominion Marine Association supports the various Constitutional objections urged by the plaintiffs against the validity and enforceability of the Michigan Watercraft Pollution Control Act of 1970. Notwithstanding its understandable desire for clean water, Michigan may not, in its effort to achieve this end, burden or impair the free flow of commerce as it has done with the adoption of the legislation in question.

I.

The Constitutional Need For Uniformity of Regulation

It is obvious that in areas affecting interstate and foreign commerce the need for uniformity of regulation of the vehicles of such commerce is paramount. When the federal government acts in such areas it pre-empts or occupies the field to the exclusion of conflicting or even compatible state legislation of the same subject. Federal supremacy thus takes over to the nullification of perhaps otherwise valid state legislation.

By the adoption of the Water Quality Improvement Act of 1970, (33 U.S.C. §1151 et seq.), Congress, we submit, has occupied the field insofar as the control of sewage from commercial vessels is concerned. (See 33 U.S.C.A.

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[2] Report of International Joint Commission, Canada and United States, *Pollution of Lake Erie, Lake Ontario and the International Section of the St. Lawrence River*, December 9, 1970 (hereinafter "IJC Report") at page 23.

§1163.) In so doing, Congress has expressly recognized the need for uniform standards of performance for marine sanitation devices and uniform regulation of the design, construction, installation and operation of any marine sanitation device on board commercial vessels.

In its occupation of this field, Congress has also recognized the need for granting shipowners time for compliance with standards and regulations (two years for new vessels, five years for existing vessels)—obviously with due process and economic considerations in mind. Michigan has not done so, but rather has given its Act immediate effect even though there are no pump out facilities available in Michigan in which to discharge waste accumulated in required vessel sanitary holding tanks. It is submitted that this Congressional recognition of the need for such time for compliance is, of itself, such occupation and pre-emption of the subject as to preclude state regulation of the subject of marine sanitation devices in the meantime. Federal policy on compliance has been expressed; states are not free to express a different policy—shorter or longer—on compliance. Cf. *Teamsters Union v. Oliver,* 358 U.S. 283.

But whatever may be said of Congressional occupation or pre-emption of the field in respect to marine sanitation devices and vessel waste disposal systems, it is evident that the need for uniformity of regulation of this subject is so clear that state action, such as the Michigan Act under consideration here, must fall whether or not Congress has acted. *Kelly v. Washington,* 302 U.S. 1, 14:

> "The remaining question is whether the state law must fall in its entirety not because of inconsistency with federal action, but because the subject is one as to which uniformity of regulation is required, and hence, whether or not Congress has acted, the state is without authority. *Cooley v. Board of Wardens,* 12 How. 299, 319; Minnesota Rate Cases, 230 U.S. 352, 399, 400.

> "The state law is a comprehensive code. While it excepts vessels which are subject to inspection under the laws of the United States, it has provisions which may be deemed to fall within the class of regulations which Congress alone can provide. For example, *Congress may establish standards and designs for the structure and equipment of vessels, and may prescribe rules for their operation, which could not properly be left to the diverse action of the states. The state of Washington might prescribe standards, designs, equipment, and rules of one sort, Oregon another, California another, and so on.*" (Emphasis added)

The subject of marine sanitation devices on commercial vessels cannot admit of diverse state action. As noted in *Kelley v. Washington,* the state of Michigan might prescribe one standard, Wisconsin another, Ohio still another, and so on throughout the Great Lakes border states and provinces. If Wisconsin, for example, would require only holding tanks, vessels with incinerating devices equipped to comply with the Michigan Act would not comply with Wisconsin's. If these Acts are valid, cannot Ohio require a sewage treatment facility aboard ships and Minnesota something else and Pennsylvania yet another "cure"? To pose the question is to answer it.

> "Vehicles equipped to meet the standards of the Illinois statute would not comply with the Arkansas standards, and vice versa. Thus, if a trailer is to be operated in both States, mudguards would have to be interchanged causing a significant delay in an operation where prompt movement may be of the essence." *Bibb v. Navajo Freight Lines,* 359 U.S. 520.

In the *Bibb* case the question was whether an Illinois statute requiring contour mudguards on highway trucks

and trailers conflicted with the Commerce Clause of the Constitution. A three-judge court concluded that the Illinois statute unreasonably burdened and obstructed interstate commerce because it made the conventional mudflap illegal in Illinois and because the statute, taken together with a Rule of the Arkansas Commerce Commission requiring straight mudflaps, "rendered the use of the same motor vehicle equipment in both States impossible". The Supreme Court affirmed and, in addition to the quote above, said:

> "Like any local law that conflicts with Federal regulatory measures * * *, state regulations that run afoul of the policy of free trade reflected in the Commerce Clause must also bow."

It was not that Congress had occupied or preempted the field that moved the Court in *Bibb* to strike down the Illinois statute; it was that the subject demanded uniformity of regulation. Such is the case here. Such was also the case in *Morgan v. Virginia,* 328 U.S. 373, where a local law required the reseating of passengers on interstate buses entering Virginia in order to comply with a local segregation law. The Court struck down the reseating law, holding that diverse seating arrangements for people of different races imposed by several states interfered with "* * * the need for national uniformity in the regulation for interstate travel".

So it is here, that not only is the need for uniformity supported by the interstate commercial aspects of the situation, it is also supported by the long standing principle that in matters maritime in nature the need for harmonious and uniform rules applicable throughout every part of the country is paramount to state regulation. The *Lottawanna,* 2 Wall. 558; *Southern Pacific Co. v. Jensen,* 244 U.S. 205 and *Knickerbocher Ice Co. v. Stewart,* 253 U.S. 149.

It is the Constitutional grant of admiralty jurisdiction which serves as the basis for this doctrine of uniformity in maritime matters and which precludes state action even in the exercise of state police power.

> "The whole commercial marine of the country is placed by the Constitution under the regulation of Congress, and all laws passed by that body in the regulation of navigation and trade, whether foreign or coastwise, is therefore but the exercise of an undisputed power. When, therefore, an Act of the legislature of a state prescribes a regulation of the subject repugnant to and inconsistent with the regulation of Congress, the state law must give way; and this, without regard to the source of power whence the state legislature derived its enactment." *Sinat v. Davenport,* 63 U.S. (22 How.) 227.

This is not to say that the states are without all power to regulate vehicles of interstate commerce. Reserved to the states is the valid exercise of police power in fields not pre-empted or occupied by Congress and in areas not demanding uniformity of regulation and where local regulation does not impede the free flow of commerce. A reasonable harbor fee exacted by a state on vessels entering a local port to defray the cost of local regulation of harbor traffic was sustained in *Clyde Mallory Lines v. Alabama,* 296 U.S. 261, where such regulation did not impede the free flow of commerce and was not made the subject of regulation by Congress. In *Cushing v. The John Fraser,* 62 U.S. 184, a local regulation of dockage and anchorage in the Port of Charleston was upheld. And local quarantine laws applying to vessels engaged in interstate or foreign commerce are recognized as a valid exercise of police power until displaced by some legislation of Congress. *Morgan Steamship Co. v. Louisiana,* 118 U.S. 465; *Norris v. Boston,* 48 U.S. (7 How.) 283. A pilot fee, *Cooley v.*

Board of Wardens, 12 How. 299, and wharfage tolls, *Parkersburg & O. River Transp. Co. v. Parkersburg,* 107 U.S. 691 may be charged. The emission of smoke from vessels may even be regulated where the local regulation does not prescribe the type of equipment vessels must have. *Huron Cement Co. v. Detroit,* 362 U.S. 440.

The regulations covered by these cases, being purely local in character and not impeding the free flow of commerce, are no authority for Michigan's attempt to prescribe equipment for vessels engaged in interstate and foreign commerce. *Bibb v. Navajo Freight Lines* and *Kelly v. Washington, supra,* make it clear that Michigan may not do so. The power of Congress to regulate is—

> "* * * necessarily exclusive whenever the subject matter is national in character and properly admits of only one uniform system. * * * Interstate commerce carried on by ships on the sea is surely of this character." *Phila. Steamship Co. v. Pennsylvania,* 122 U.S. 326.

It is to be anticipated that *Huron Cement Co. v. Detroit,* 362 U.S. 440, which upheld the application of the Detroit smoke emission ordinance to vessels engaged in interstate commerce will be urged in support of Michigan's Watercraft Pollution Control Act of 1970. The *Huron Cement* case is clearly distinguishable. First and foremost, the Detroit smoke ordinance did not prescribe a type or types of equipment required for vessels. While vessel equipment had to be inspected and certified, there was no showing in the record of any attempt to enforce this provision and, accordingly the Court in footnote 1 expressly left open the question of the validity of the inspection and certification provisions (hinting, we submit, at invalidity). Further, there was no Federal regulation on the emission of smoke

from vessels. The Federal inspection laws which were urged as showing occupation of the field had to do with safety of ships, passengers and crew from the perils of maritime navigation, and not with the elimination of air pollution. Except for State inspection and certification, the foregoing features, the absence of which sustained the Detroit smoke ordinance, are present here. The Michigan Act prescribes specific types of marine sanitation devices and there is a Federal Act on the specific subject of marine sanitation devices, 33 U.S.C.A. §1163.

We submit that the need for uniformity cannot be doubted and for this reason the Michigan Act—albeit noble of purpose—must fall. As the International Joint Commission said only one year ago (IJC Report p. 108 and 110):

> "The waters of the Lower Great Lakes and the International Section of the St. Lawrence River lie within both the United States and Canada, and also within the States of Michigan, Ohio, and New York, and the Commonwealth of Pennsylvania and the Province of Ontario. All seven of these jurisdictions have laws relating to the prevention or control of pollution of that portion of the waters situated in their territory, and governmental agencies responsible for administering those laws. As might be expected in such circumstances, the policies and goals and the vigour with which they are pursued in the several jurisdictions are not uniform; and there is considerable variation in the actual laws, their administration and enforcement."
>
> * * * * *
>
> "While in some cases the differences among jurisdictions are more apparent than real, in others the differences are such that the laws as applied in the various jurisdictions are incompatible. Obviously such inconsistency presents serious obstacles to the effective implementation of any concerted programme of pollution control and abatement throughout the Lower Great Lakes."

II.

Effect Of Boundary Waters Treaty Of 1909 Between The United States and Canada

What has been said should not be taken as an admission or recognition by Dominion Marine Association of the power of even the Congress of the United States—unless acting pursuant to or in furtherance of an international agreement—to legislate, or the power of the U. S. Federal government to regulate, in areas of marine sanitation devices of, and sewage discharge from, Canadian registry vessels plying the Great Lakes. This, *amicus curiae,* while pointing out above the need for and law requiring national uniformity, goes one step further and urges that the situation demands and the law requires international uniformity. For this reason as well the Michigan Act is invalid.

In 1909 the United States and Great Britain entered into the Boundary Waters Treaty between the United States and Canada, 36 Stat. 2448, Treaty Series No. 548. That Treaty provides in Article I[3] that the parties agree that navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships of both countries equally, subject to laws and regulations of either country not inconsistent with the privilege of free navigation.

---

[3] "The High Contracting Parties agree that the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, subject, however, to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries."

We submit, this Article clearly precludes state action such as the Michigan Act in question. It may permit Federal action (* * * subject * * * to any laws and regulations of either country * * *") but, by its failure to mention state laws or regulations in Article I, its intention is clearly to prohibit Michigan from subjecting to fines persons who operate vessels in boundary waters when their vessels do not comply with the Michigan Act.

Article IV of the Treaty provides:

> "It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other."

Thus, the subject of pollution is a subject within the scope of the Treaty; a recognition that pollution of international waters is a problem of international scope and importance.

That problem is being dealt with on the international level. The Treaty also provides in Article VII for the establishment of an International Joint Commission. The IJC can resolve disputes in certain cases (Article VIII) and can examine, study and report on matters referred to it, giving conclusions and recommendations as may be appropriate (Article IX).

The IJC only a year ago completed an exhaustive study of pollution of Lakes Erie and Ontario and the international section of the St. Lawrence Seaway and has issued its Report under date of December 9, 1970. The document runs to 174 pages. Suffice to say that, among other things, "compatible" regulations are called for. It should also be emphasized that pursuant to recommendations of the IJC, diplomatic talks are underway on the subject of Great Lakes water quality improvement. See U.S. Department

of State press release No. 189 dated June 24, 1970 (Appendix A) pertaining to the Ministerial Meeting on Great Lakes pollution. It is important to note that:

> "* * * the Ministers concerned have agreed to achieve compatible regulations."

The supremacy of the national power in the field of foreign affairs is clearly mandated by the Constitution and cannot be doubted. *Hines v. Davidowitz,* 312 U.S. 52; *Zschernig v. Miller,* 389 U.S. 429. Nor can it be doubted that a treaty is the supreme law of the land.

> "* * * Our system of government is such that the interest of the cities, countries and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." *Hines v. Davidowitz, supra.*

In areas of international concern, such as boundary water cleanliness, where the subject is under consideration at the diplomatic level between two countries on either side of that boundary "[a]ny concurrent state power that may exist is restricted to the narrowest of limits." *Hines v. Davidowitz, supra.* That being so, the principle will not allow the instrusion of state legislation into the field of foreign affairs which the Constitution entrusts to the President and the Congress. *Zschernig v. Miller, supra.*

In its attempt to impose its sanitation equipment standards on foreign vessels, be they Canadian lakers or the many salt water vessels that ply the Lakes, Michigan clearly has overstepped its bounds and has sought to burden foreign commerce. It may not do so. *People v. Compagnie Generale Transatlantique,* 107 U.S. 59.

Especially is this so where a Treaty exists between two countries covering the subject of navigation and use of boundary waters between those two countries, and diplomatic efforts are in progress with a view to solution of the boundary water pollution problem common to both countries. This situation simply cannot admit of local regulation. Uniformity—international uniformity—is essential to the cure and proves the invalidity of Michigan's well intentioned effort.

CONCLUSION

The Michigan Watercraft Pollution Control Act of 1970 is in contravention of the United States Constitution for several reasons, including, we submit, occupation of the field by Federal legislation, the need for uniformity of regulation in the area sought to be regulated, and the existence of the Boundary Waters Treaty of 1909.

Respectfully submitted,

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APPENDIX A

DEPARTMENT OF STATE FOR THE PRESS

June 24, 1970 No. 189

Communique of the Canada/United States Ministerial Meeting on Great Lakes Pollution

(June 23, 1970)

Ministers and representatives of the governments of Canada and the United States met today in Ottawa to discuss common problems of pollution in the Great Lakes. The Canadian delegation included the Minister of Energy and Resources Management from the Province of Ontario. At the meeting they discussed each country's current plans, programs and legislation to improve water quality in the Great Lakes.

Ministers and representatives discussed the recommendations in a Special Report submitted in April by the International Joint Commission on potential oil pollution, eutrophication and pollution from watercraft. It was agreed:

a) The Canadian contingency plan for the Great Lakes for spills of oil and hazardous materials which will shortly come into operation, will be fully coordinated with the new United States plan.

b) Inputs of phospates into the Great Lakes should be reduced in order to arrest and reverse eutrophication of the Great Lakes. Canadian legislation will permit the Canadian Government to implement the Commission's recommendations for reducing and eliminating phosphates

from detergents and the Canadian Government has announced its intentions to take action that would meet IJC recommendations. Standards are in effect on the United States side of the Lakes which will require the achievement of an 80% removal of all phosphates from municipal and industrial sewage (including detergents) by 1973, and in advance of the target date of 1975 recommended by the Commission; the United States Government is continuing its intensive review of the removal of phosphates from detergents.

c) In both countries, legislation exists for the regulation of waste disposal by commercial vessels and pleasure craft; and the Ministers concerned have agreed to achieve compatible regulations.

It was noted that the Ontario Government intends to modify its gas drilling program on Lake Erie to conform to the recommendations of the Commission in the Special Report. There is no gas well drilling by Michigan, Ohio, New York or Pennsylvania in Lake Erie. It was further noted that phosphate removal facilities are being initiated by Ontario with a view to meeting the recommendations of the Commissioners.

Ministers and representatives expressed deep concern about the critical situation in the Great Lakes, and noted the determination of the Governments to take decisive action.

The Ministers have agreed to the establishment of a working group to consider common water quality objectives and implementing programs which may be proposed by either government to the working group. This working group will report back to this Ministerial Conference which will be reconvened subsequent to the final report of the IJC.

The United States delegation was led by the Honorable Russell E. Train, Chairman of the Council on Environment Quality; United States Ambassador Adolph Schmidt; Mr. Carl L. Klein, Assistant Secretary of Interior for Water Quality Research and Rear Admiral Robert W. Goehring, Chief of Operations, U. S. Coast Guard, who were accompanied by senior officials from the Department of State, the Department of the Interior, the Department of Transportation and the Council on Environmental Quality.

The Canadian delegation was led by the Honorable Mitchell Sharp, Secretary of State for External Affairs; the Honorable J. J. Greene, Minister of Energy, Mines and Resources; the Honorable J. Davis, Minister of Fisheries and Forestry; the Honorable Herb Gray, Minister without Portfolio and the Honorable George Kerr, Minister of Energy and Resources Management for Ontario.

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Appellees.

Appeal From The United States District Court
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-422

LAKE CARRIERS' ASSOCIATION, et al.,

Appellants,

vs.

RALPH A. MacMULLAN, et al.,

Appellees.

Appeal From The United States District Court
For The Eastern District Of Michigan,
Southern Division.

BRIEF FOR APPELLEES.

COUNTERSTATEMENT OF FACTS

In essence appellee accepts the Statement of the Case submitted by appellants. However, certain omissions therefrom compel the following additions to the Statement submitted by appellants.

Presently there are sanitary devices on the market which comply with the requirements of the Michigan statute, Act 167, Public Acts of Michigan 1970, and are installed upon and being used by a number of commercial vessels plying the Great Lakes. (A. 49, 50, 110). The Michigan statute imposes no requirement not within the capability of present technology.

There has been no enforcement of the Michigan statute against commercial vessels on the Great Lakes. Rather, Michigan has embarked upon a program of obtaining

voluntary compliance by the lake carriers. (A. 94, 140). Granted, there are presently only several pump-out facilities on shore for commercial vessels. However, Michigan authorities have been working on the problem with the carriers and municipalities (A. 94, 115), as well as with companies owning docks and wharves. (A. 107, 108, 136, 137, 138). Certainly no harrassment has or will occur. (A. 140).

Various suggestions were made as to the location of the required holding tanks, including use of the ballast tanks. Appellants assert that ballast tanks could not be used in order to comply with Michigan law because of corrosion. However, this could be simply solved by coatings or liners being placed in the ballast tanks. (A. 101, 102). The experience of the Ford Motor Company and others indicates that location of the tanks is a problem easy of solution.

While many municipal sewage systems discharge effluent equivalent in quality to that now being discharged by the commercial vessels, the problem arises in that the municipal systems are a known point of discharge and the water quality for that particular area can be set and governed accordingly, whereas commercial vessel discharges are obviously from a highly mobile point and no control of same is possible in the absence of the complete retention provided for in the Michigan statute. (A. 94, 120, 140). Thus, such discharges by commercial vessels may occur at any point on the Great Lakes including points where municipal water intakes are located, bathing beaches, and other points of domestic use and recreational sites (A. 95), and thus become a hazard to health. (A. 64, 65, 98, 120, 123, 124).

In view of the fact that the State of Michigan has the longest shoreline of any state except Alaska, and all of

said shoreline borders on the Great Lakes, this matter is of paramount interest to this State. The bulk of Michigan's population lives along the shoreline and draws its water supply from the Great Lakes. Therefore unregulated pollution of these waters as is being committed by appellants and other lake carriers poses a serious menace to the health of Michigan inhabitants. (A. 122). The charts attached to appellants' jurisdictional statement graphically demonstrate the widespread nature of pollution from vessels and the frequency of their in-shore operations is stark testimony of the fact that overboard discharge of human waste imperils the health of our populace.

Despite amendments to the Federal Water Pollution Control Act, 33 USC No. 1151, et seq., no change has been made in Sec. 1151(b) thereof wherein it is declared to be the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution. Further, Sec. 1151(c) of the Act states that nothing therein shall be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

For the convenience of the Court we are reproducing as Appendix A hereto, the Opinion of the District Court.

ARGUMENT

I.

THE TRIAL COURT PROPERLY ABSTAINED FROM DECIDING THIS CAUSE ON ITS MERITS AND DEFERRED TO THE STATE COURTS.

A.

A Federal District Court May Properly Invoke The "Abstention Doctrine" Where A Case May Be Disposed Of By Interpretation In The Michigan Court System.

In *Railroad Commission v. Pullman Co.*, 312 US 496 (1941), this Court first embarked upon the modern doctrine of abstention. Speaking for a unanimous Court, Mr. Justice Frankfurter stated:

> "In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. * * * The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication."

There is considerable recognition of circumstances under which a federal court may decline to proceed (or to abstain) even though it has jurisdiction under the Constitution and the statutes.

This Court, for instance, has consistently applied the concept that "proper exercise of federal jurisdiction requires that controversies involving unsettled questions of state law be decided in the state tribunals preliminary

to a federal court's consideration of the underlying federal constitutional issues." *City of Meridian* v. *Southern Bell Telephone and Telegraph Co.*, 358 US 639, 640, 641 (1959); *Fornaris* v. *Ridge Tool Co.*, 400 US 41 (1970).

Two recent cases of particular interest in spelling out guidelines for the abstention doctrine are *Reetz* v. *Bozanich*, 397 US 82, 85 (1970), and *Askew* v. *Hargrave*, 401 US 476 (1971). In *Reetz*, this Court held that a federal district court erred in not abstaining while the parties to the suit sought a state court decision on the effect of an Alaskan statute which established guidelines on who would be eligible for salmon net gear licenses for commercial fishing. This Court felt that a state court decision could conceivably avoid any decision under the Fourteenth Amendment and would avoid any possible irritant in the federal-state relationship.

Askew v. *Hargrave*, 401 US 476 (1971), strongly endorsed the abstention doctrine as set out in *Reetz*. This Court held in *Askew* that a federal District Court should abstain from considering a federal action challenging a state statute in deference to a pending state court action which was filed subsequent to the federal suit.

The statute here under attack, the Michigan Watercraft Pollution Control Act, MCLA 323.331; MSA 3.533(201), has *not* as yet been interpreted by a Michigan Court. Indeed, a decision by a Michigan Court might well obviate the need for a decision by a federal court because of the following three reasons:

(1) Appellants assert that the Michigan Watercraft Pollution Control Act denied them the equal protection of the laws. Art. 1, Sec. 2 of the 1963 Michigan Constitution, however, provides that "no persons shall

be denied the equal protection of the laws . . . .'' Conceivably, a Michigan Court could resolve the instant matter on state law alone which would, therefore, avoid the federal questions which appellants seek to pose.

(2) Appellants also allege that the Michigan Watercraft Pollution Control Act denies them due process. Yet, Art. 1, Sec. 17 of the 1963 Michigan Constitution provides that ''no person shall be . . . deprived of life, liberty or property, without due process of law.'' A Michigan Court could here also conceivably resolve the entire matter on a state law question.

(3) Appellants also assert that the Michigan Watercraft Pollution Control Act is inconsistent with federal law. Sec. 11 of the Michigan Watercraft Pollution Control Act, however, provides that:

> ''To be enforceable, the provision or the rule shall be of such flexibility that a watercraft owner, in carrying out the provision or rule, is able to maintain maritime safety requirements and *comply with the federal marine and navigation laws and regulations.*'' (Emphasis added.)

A Michigan Court is expressly mandated to interpret the Michigan Watercraft Pollution Control Act, therefore, in a manner which would obviate completely the necessity for a federal court decision.

Thus, it cannot be denied that the Michigan Watercraft Pollution Control Act involves unsettled questions of State law and that a Federal District Court may and should abstain from deciding the federal question when there are unsettled questions of State law.

B.

A Federal District Court Should Not Enjoin Or Disrupt State Criminal Proceedings Unless Irreparable Injury Is Shown From Harassment In The Prosecution Of Patently Unconstitutional Statutes.

The sensitive nature of our system which involves both State and National interests has produced a long standing policy against federal court interference with state court proceedings. See, *Fenner et al* v. *Boykin et al,* 271 US 240 (1926); *Younger* v. *Harris,* 401 US 37 (1971).

This Court has reviewed this long standing policy recently in a series of cases. In *Younger* v. *Harris,* 401 US 37 (1971), for example, an action was brought in federal court to enjoin prosecution under a State Syndicalism Act alleging that the prosecution and the statute had a "chilling effect" upon the exercise of the right of free speech. This Court held, however, in *Younger* that "federalism" requires that federal courts not enjoin state criminal proceedings except in the exceptional case of bad faith and harrassment in the prosecution of patently unconstitutional statutes where the danger of irreparable loss to the defendants is both great and immediate.

Similarly, in *Samuels* v. *Mackel,* 401 US 66 (1971), an action was brought in federal court seeking a declaratory judgment holding a state criminal anarchy statute unconstitutional. This Court held that the standards as expressed in *Younger* apply even though declaratory relief rather than injunctive relief was involved.

Furthermore, in *Boyle* v. *Landry,* 401 US 77 (1971), this Court applied the *Younger* standards to a case that was brought under the guise of threatened criminal prosecution.

The *Younger*, *Samuels* and *Boyle* cases are undoubtedly intended to limit the effect of *Dombrowski* v. *Pfister*, 380 US 479 (1965), a case which appellants rely upon heavily. In *Dombrowski*, this Court enjoined a threatened criminal prosecution under an unconstitutionally vague statute. As mentioned earlier, however, the circumstances in *Dombrowski* were extreme. The State law involved in *Dombrowski* was unconstitutional as applied and was being utilized in an attempt to discourage persons from their endeavors in the civil rights field. It was also questionable whether officials had any real hope at all of obtaining convictions. In short, *Dombrowski* represented a factual situation of pure harassment and a statute which on its face was constitutionally suspect.

If less exacting standards for injunctions are to be applied, as was the case in *Dombrowski* and as the appellants suggest, the result would be an unfortunate flooding of federal courts with pleas for intervention in threatened or pending state proceedings. It would also result in serious friction between state and federal forums as the inevitable race between prosecutors and defendants to different jurisdictions unfolded.

Therefore, the appropriate restrictive policy and rule to follow in the instant case has been repeatedly stated by this Court. Mr. Justice Whittaker succinctly stated the guidelines regarding the role of federal courts vis-a-vis state courts in *Wilson* v. *Schnettler*, 365 US 381, 385 (1961), as follows:

> "There is still another cardinal reason why it was proper for the District Court to dismiss the complaint. We live in the jurisdiction of two sovereignties. Each has its own system of courts to interpret and enforce its laws, although in common territory. These courts could not perform their respective functions

without embarrassing conflicts unless rules were adopted to avoid them. Such rules have been adopted. One of them is that an accused 'should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial.' *Ponzi* v. *Fessenden*, 258 U.S. 254, 260. Another is that *federal courts should not exercise their discretionary power 'to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent ....' Douglas* v. *City of Jeannette, supra,* at 163." (Emphasis added).

While holding abstention improper in *Dombrowski* v. *Pfister*, 380 US 479 (1965), the Court did give guidance when it stated (pages 484, 485):

"... considerations of federalism have tempered the exercise of equitable power, for the Court has recognized that *federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework.* It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings." (Emphasis added).

Finally, this Court has just recently succinctly stated:

"As our holdings today in *Younger* v. *Harris,* ante, and *Samuels* v. *Mackell,* ante, show, the normal course of state criminal prosecutions cannot be disrupted

> or blocked on the basis of charges which in the last analysis amount to nothing more than speculation about the future." *Boyle* v. *Landry*, 401 US 77, 81 (1971).

The guidelines for the federal courts then are quite clear.

In the instant case, appellants seek to raise the constitutional validity of a Michigan criminal statute in federal court. They seek to disrupt or block the normal course of Michigan criminal prosecutions. Yet, there is no establishment by the appellants of great and immediate irreparable harm as is required for federal court intervention under the *Younger* and *Samuels* reasoning or even under *Dombrowski*. At best, appellants seek to vitiate a state criminal law statute on "nothing more than speculation about the future." The District Court, therefore, properly abstained here rather than disrupt the Michigan system of criminal prosecutions based on speculative allegations.

C.

This Court Should Not Issue Appellants An Advisory Opinion That Would Have The Effect Of Prohibiting Michigan From Taking Any Action In The Field Of Great Lakes Water Pollution.

Stripped of all its embellishment, appellants' argument is nothing more than an attempt to secure an advisory opinion that would have the effect of prohibiting any state action in the field of Great Lakes water pollution until such time as the federal government manifests its intention and takes control. This is further substantiated by appellants' position that this Court should proceed to decide the case immediately. (See Appellants' Brief, at 16, 17.)

This Court, however, should decline to issue appellants an advisory opinion. Of particular significance on this point is the case of *Public Service Commission of Utah, et al.*, v. *Wycoff Company, Inc.*, 344 US 237 (1952). The facts in *Wycoff* are rather similar to the case at bar. In *Wycoff*, the respondent-corporation sought in federal court a declaratory judgment that transporting goods between points in a state constituted interstate commerce and did not require permission from a state public service commission.

The respondent-corporation also sought an injunction restraining the state public service commission from interfering with such transportation. This Court in an opinion authorized by Mr. Justice Jackson, however, held that the circumstances were such as to warrant the court in denying declaratory relief and that injunctive relief was also improper.

Summarizing the case before it in *Wycoff*, Mr. Justice Jackson said at 245:

> "In the first place, this dispute has not matured to a point where we can see what, if any, concrete controversy will develop. It is much like asking a declaration that the State has no power to enact legislation that may be under consideration but has not yet shaped up into an enactment."

And the Court went on to say at 247-248:

> "*Declaratory proceedings in the federal courts against state officials must be decided with regard for the implications of our federal system.* State administrative bodies have the initial right to reduce the general policies of state regulatory statutes into con-

crete orders and the primary right to take evidence and make findings of fact. *It is the state courts which have the first and the last word as to the meaning of state statutes* and whether a particular order is within the legislative terms of reference so as to make it the action of the State. We have disapproved anticipatory declarations as to state regulatory statutes, even where the case originated in and was entertained by courts of the State affected. *Alabama State Federation of Labor* v. *McAdory,* 325 U.S. 450. Anticipatory judgment by a federal court to frustrate action by a state agency is even less tolerable to our federalism. Is the declaration contemplated here to be res judicata, so that the Commission cannot hear evidence and decide any matter for itself? If so, the federal court has virtually lifted the case out of the State Commission before it could be heard. If not, the federal judgment serves no useful purpose as a final determination of rights.

"The procedures of review usually afford ample protection to a carrier whose federal rights are actually invaded, and there are remedies for threatened irreparable injuries. *State courts are bound equally with the federal courts by the Federal Constitution and laws. Ultimate recourse may be had to this Court by certiorari if a state court has allegedly denied a federal right.*

"In this case, as in many actions for declaratory judgment, the realistic position of the parties is reversed. The plaintiff is seeking to establish a defense against a cause of action which the declaratory defendant may assert in the Utah courts. Respondent here has sought to ward off possible action of the petitioners by seeking a declaratory judgment to the effect that he will have a good defense when and if

that cause of action is asserted. Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right; if that right is in reality in the nature of a defense to a threatened cause of action. *Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law. Tennessee* v. *Union & Planters' Bank*, 152 U.S. 454; *The Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22; *Taylor* v. *Anderson*, 234 U.S. 74." (Emphasis added).

We have burdened the Court with this lengthy quotation inasmuch as the language of *Wycoff* compels the conclusion that the District Court properly decided to abstain in the case at bar.

II.

THE MICHIGAN STATUTE IMPOSES NO UNDUE BURDEN ON INTERSTATE OR FOREIGN COMMERCE.

A.

The Michigan Statute Is A Lawful Exercise Of The State's Police Power In The Promotion Of The Public Health, Safety And Welfare.

Appellants allege that enforcement of the Michigan Watercraft Pollution Act of 1970 constitutes the taking of appellants' property without due process of law, constitutes a denial of the equal protection of the law, and is vague and ambiguous in that the Act does not specify with certainty the conduct it intends to proscribe and punish.

These arguments are to no avail however if there is any reasonable basis for the legislative enactment. This principle was enunciated by this Court in *Morey* v. *Doud* 354 US 457 (1957), when speaking through Mr. Justice Burton, the rules for testing a state's action in light of the equal protection clause were established:

> "'1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When

the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitary.' *Lindsley* v. *Natural Carbonic Gas Co.*, 220 US 61, 78-79."

The legislature is the chosen representative of the people of the State of Michigan and, when it speaks, there is a presumption of constitutionality unless its repugnance to Federal mandates clearly appears beyond all reasonable doubt. *Tower Realty* v. *City of Detroit*, 196 Fed 2d 710 (6th Cir.. 1952). In *Williams* v. *Lee Optical Company*, 348 US 483 (1955), this Court announced at page 488 that:

> "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident or out of harmony with a particular school of thought."

In the same decision this Court went on to remark:

> ". . . The prohibition of the equal protection clause goes no further than the invidious discrimination."

State legislation based upon the exercise of its police power, which does not unduly burden interstate commerce is not in conflict with the commerce clause. *Huron Portland Cement Co,* v. *Detroit,* 362 US 440 (1960). In *Huron* Mr. Justice Stewart succinctly summarized the law in this area:

> "In determining whether the state has imposed an

undue burden on interstate commerce, it must be borne in mind that the Constitution when 'conferring upon Congress the regulation of commerce . . . never intended to cut the states off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly' affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution."

Of note is the fact that in *Huron*, as in this case the vessels had to install special equipment to comply with the City's anti-pollution ordinance.

At issue in this cause we have a state statute designed to prevent appellants and others in their class from pouring their filth, no matter how well treated, into Michigan waters of the Great Lakes. It is difficult to think of a more salutary exercise of the state's police power. The statute is applicable to all watercraft plying Michigan waters and thus belies any equal protection or discrimination argument.

The mere fact that appellants may have to make a pecuniary expenditure to comply with the Michigan statute does not justify the overthrow of the legislation. *L'Hote* v. *City of New Orleans*, 177 US 588 (1900). Speaking through Mr. Justice McKenna, this Court in *Erie Railroad Company* v. *Williams* 233 US 686 (1914) stated:

> "It is hardly necessary to say that cost and inconvenience would have to be very great before they could become an element in the consideration of the right of a state to exert its reserved power or its Police Power."

Testimony in this case regarding the cost of installing total retention devices ranges all the way from $20,000 per vessel to $100,000 per vessel. (A. 72, 73, 111). In view of the fact that these vessels are now costing some $14,000,000 to construct (R. 130, 131), the cost of installing a total retention system is certainly an insignificant factor in this discussion.

B.

The Michigan Statue Is Not Unconstitutionally Vague So As To Prohibit Appellants From Complying Therewith.

At the outset we point out an apparent dichotomy between appellants and amici supporting them in this matter. Appellants claim impossibility of compliance because of alleged vagueness in the statute whereas amicus *Assurance-foreningen Gard, et al.,* state at page 5 of their brief:

> "The terms of the Michigan Act are so plain as to require no interpretation whatever by the Michigan courts."

The terminology in Act 167, Public Acts of 1970 contains no mysterious words which would vitiate the statute or be any hindrance to appellants in complying therewith. Very simply, the portion of the law with which we are here concerned, prescribes that no sewage shall be discharged into the waters of this state and that to accomplish this purpose holding tanks, self-contained marine toilets or incinerating devices shall be part of the vessel's equipment. In fact appellants' own witness gave a comprehensive description of holding tanks and their installation. (A. 65-71). Apellants represent that they are having difficulty in the construction of the term "noxious" in the Michigan Statute. Webster's Seventh New Collegiate Dictionary clears up

their problem by defining "noxious" as any "harmful" substance. Any substance, such as sewage, is per se harmful to the quality of water and its discharge in said water would make same "noxious." The term is easily understood. (A. 40). As stated earlier, appellants' foreign brethren do not seem to have the interpretative problem pleaded by appellants.

All of appellants' arguments alleging vagueness and uncertainty in the Michigan statute are, if true, merely arguments stressing a need for construction of the statute by Michigan courts and buttressing the District Court's decision to abstain. While there may be room for construction of the statute by the Michigan courts which would nullify appellants' federal claims, the wording of the statute leaves no doubt as to what appellants are required to do. Moreover, the very Federal act upon which the appellants rely, The Water Quality Improvement Act of 1970, contains express provision for differing standards to meet varying local conditions:

> ". . . Upon application by a State, and where the Secretary determines that any applicable water quality standards require such a prohibition, he shall by regulation completely prohibit the discharge from a vessel of any sewage (whether treated or not) into those waters of such State which are the subject of the application and to which such standards apply."

Furthermore, the record does not support the existence of any alleged conflict between State and Federal law.

Thus, for there to be any conflict on the face of these two enactments, it would be necessary to postulate a factual situation in which a boat was discharging sewage which was "adequately treated" for purposes of Federal law but was

"detrimental to the public health" for purposes of State law. The State suggests that the record of this case is wholly barren of any facts which would support such a factual situation.

This Court in *Huron Portland Cement Company* v. *City of Detroit,* 362 US 440, at 445-446 (1960), recognized that unless there was a clear "overlap" on the record, none would be presumed where the State was acting to "protect the health" of the local community.

III.

THE MICHIGAN WATERCRAFT POLLUTION CONTROL ACT OF 1970 IS A REASONABLE AND NECESSARY EXERCISE OF THE POLICE POWER OF THE STATE OF MICHIGAN. NOTHING IN THE FEDERAL CONSTITUTION OR IN EXISTING FEDERAL LAW PROHIBTS THE STATE FROM SO EXERCISING ITS POLICE POWER.

The appellants' argument proceeds from the premise that there is a conflict between State and Federal law in the area of control of watercraft pollution. In point of fact, however, there is, on this record, no such conflict presented.

Thus, contrary to the appellants' assertion that "national uniformity is necessary" and that "compliance with both federal and state reguations is a physical impossibility" (Br. 19), the Congress has clearly indicated in the Federal Water Pollution Control Act that this is primarily an area of State responsibility:

"...

"(b) In connection with the exercise of jurisdiction over the waterways of the Nation and in consequence

of the benefits resulting to the public health and welfare by the prevention and control of water pollution, it is declared to be the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution, to support and aid technical research relating to the prevention and control of water pollution, and to provide Federal technical services and financial aid to State and interstate agencies and to municipalities in connection with the prevention and control of water pollution. . . .

"(c) Nothing in this chapter shall be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States."

IV.

THE CONGRESS, IN ENACTING THE WATER QUALITY IMPROVEMENT ACT OF 1970, EXPRESSED A CLEAR AND MANIFEST INTENTION TO PERMIT THE STATES TO ADOPT AND ENFORCE REASONABLE REGULATIONS UNTIL THE EFFECTIVE DATE OF FEDERAL REGULATIONS.

THE FEDERAL REGULATIONS WILL NOT BE EFFECTIVE UNTIL AT LEAST FIVE YEARS AFTER PROMULGATION.

THE FEDERAL REGULATIONS HAVE NOT YET BEEN PROMULGATED.

THEREFORE, THIS AREA IS OPEN TO STATE REGULATION FOR AT LEAST FIVE MORE YEARS.

The Congress, in enacting the Water Quality Improve-

ment Act of 1970, clearly manifested its intention to permit reasonable State regulation with respect to marine sanitation devices until such time as the Federal government was able to effectively occupy the field.

Thus, the Federal law, in Section 13(a) (2) (33 USC 1163) defines an "existing vessel" as any watercraft "the construction of which is initiated before promulgation" of Federal standards. No Federal standard having yet been promulgated, *every* vessel involved in the matter at bar is, by Congressional definition, an "existing vessel." Section 13(c) (1) (33 USC 1163), expressly and clearly provides that Federal standards shall not be "effective" as to "existing vessels" until "five years after promulgation." Section 13(f) (33 USC 1163), then provides that *after the effective date* of the Federal regulations, the States may no longer enforce their own statutes or regulations.

Therefore, as is most clearly indicated by the use of the word "effective" in Section 13(c) (1) as compared to the use of that same word in Section 13(f), it is manifestly obvious that the Congress did not intend to occupy the field to the exclusion of the States until such time as the Federal government was prepared to engage in a meaningful regulation of the field.

To give any other interpretation to the Federal Act is to assume that the Congress, having first determined that the pollution of the Great Lakes was a matter of grave national concern, then adopted a scheme that could have no impact for a minimum of five years, during which the States would be powerless to act, and massive pollution could occur without either the Federal or State governments having any authority to do anything to abate the situation. Such a construction is simply not supported by the Congressional language which imposes heavy responsibility in the area of water pollution on the States.

Therefore, there is no question as a matter of law but that Michigan may presently enforce its statute. Indeed, Section 1 of the Federal Water Pollution Act, as amended, expressly declares it to be the policy of the Congress to *recognize, preserve* and *protect* the primary responsibilities and rights of the States in preventing and controlling water pollution (33 USC §1151(b)).

V.

THERE IS NOTHING IN THE RECORD OF THIS CAUSE TO SUGGEST THAT THE STATE WILL INTERPRET, CONSTRUE, OR ENFORCE ITS STATUTE SO AS TO CONFLICT WITH THE VESSEL INSPECTION LAWS ADMINISTERED BY THE UNITED STATES COAST GUARD.

The authority of the United States Coast Guard to prescribe standards with respect to marine pollution control devices is not contained in the statutes upon which the appellants rely, but rather is contained in the Water Quality Improvement Act of 1970, specifically in Sections 13(c) (2), 13(g) (2), and 13(k) (33 USC 1163).

Since no Federal standards for the enforcement of the Federal Act have yet been promulgated, the carriers are engaged in mere hypothetical speculation when they suggest that there is any conflict between State law and Federal regulations.

It is also most relevant to note that the Michigan legislature manifested its intention that there be no such conflict by specifically enacting in Section 11 of the Michigan Watercraft Pollution Control Act of 1970 that:

"Any person who violates any provision of this act is guilty of a misdemeanor and shall be fined not more than $500.00. To be enforceable, the provision or the rule shall be of such flexibility that a watercraft owner, in carrying out the provision or rule, is able to maintain maritime safety requirements and comply with the federal marine and navigation laws and regulations."

Furthermore, as the District Court so correctly stated, if there is any attempt by the State to construe the State statute so as to constitute an undue burden upon interstate commerce, there would then be an actual controversy presented which should, in light of Section 11 of the Michigan act, then be litigated in State court. (11b, 12b of Appendix A. of this Brief).

Upon this state of the record, however, there is no showing of any conflict, real or imagined. The carriers do assert (Br. 28) that "the biogest system . . . cannot pass muster under local Michigan law." The biogest system, used by many vessels however, may or may not "pass muster" under the Federal regulations. As Mr. Joe Girz, an executive of the Biogest Corporation, manufacturer of this system, recently admitted:

"...

"Based on what preliminary information we have on the federal standards proposed by the Environmental Protection Agency, *we are confident that we can meet these new effluent* criteria. We come to this conclusion based on presently accepted standards, sanitary engineering rationale.

"Of course, as you all know, any unit must eventually

conform to Coast Guard test conditions, which conditions are yet to be formulated." (Emphasis supplied.)

—*Sewage Control for Great Lakes Vessels,* "Proceedings of a Symposium held September 29, 1971, Louisville, Kentucky," Society of Naval Architects & Marine Engineers, published by the University of Michigan College of Engineering, January 1972, page 65.

Indeed, there are severe technical problems with the biogest system. In an official report of the United States Government, it was recently noted that:

"In principle, the aerobic digestion system should adequately treat shipboard sewage and also ground, grease-free galley wastes. There are, however, many shipboard environmental factors that degrade system efficiency.

"The primary problem with regard to aerobic digestion systems aboard ship relates to the care and feeding of the aerobic bacteria. When an ample supply of both food and oxygen is available these bacteria thrive, multiply, and do their job well. But if their food supply is limited, they die; if there is an oversupply of food, with a concomitant reduction in oxygen content, they also die. They are sensitive to many materials often dumped into shipboard sanitary systems such as cleaning fluids, detergents, and other chemicals. If initially working in either a salt water or a fresh water environment they will perform as expected but, if the environment changes, the bacteria do not accommodate rapidly to it, and for some period of time they fail to function while adapting to the change. Additionally, these systems do not respond adequately

to the hydraulic shock loading frequently encountered on shipboard.

"In some systems the biological decomposition process is accelerated by heating the aeration tank. It might also be pointed out that the process slows down considerably at lower temperatures, which often occur aboard ship, and thus some heating is required both in the aeration tank and in the separation tank. The efficiency of the process can be reduced by ship motions that tend to disrupt the gravitational and buoyant separation of heavy and light solids in the separation tank, with the result that solid particles frequently accompany the presumably clear liquid into the disinfecting tank. Also, a sludge comprising only partially oxidized organic compounds, tends to deposit on the bottom of the aeration and separation tanks; this requires disposal by some other means if effluent quality is to be maintained."

—"Treatment and Disposal of Vessel Sanitary Wastes," National Academy of Sciences, MRIS Report July 1971, page 47.

The State, therefore, contends there is no concrete factual basis upon which to debate or litigate Michigan requirements on the issue at this time. If the carriers desire to put in some proofs and seek a declaration of their rights, no good reason is here shown why the issue should not be litigated in the Michigan Court system.

The absence of any substantial or meaningful conflict is further demonstrated by a comparison of the impugned state statutory scheme with the Federal Water Pollution Act. Thus, the Federal Act provides in pertinent part:

". . . the Secretary . . . shall promulgate Federal standards of performance for marine sanitation devices . . . which shall be designed to prevent the discharge of untreated or inadequately treated sewage into or upon the navigable waters of the United states. . . ." (33 USC §1163(b) (1)).

The State Act is harmonious with this scheme in that Michigan law prohibits with the exception of human waste, only those discharges which are "detrimental to the public health or to the enjoyment of the water for recreational purposes." (Section 3(1)). In Section 11 of the Michigan Act, the legislature specifically deferred to Federal standards:

". . . To be enforceable, the provision or the rule shall be of such flexibility that a watercraft owner, in carrying out the provision or rule, is able to maintain maritime safety requirements and comply with the federal marine and navigation laws and regulations."

VI.

PRESENT SHORTAGE OF PUMP-OUT FACILITIES NO REASON FOR VITIATING THE MICHIGAN STATUTE.

The carriers' argument proceeds from a false premise. The reason that there are as yet only limited pump-out facilities available is quite simply due to the pendency of this litigation. Most of the carriers *use their own piers* for loading and unloading. (A. 99). Rather, than setting some central point for pump-out and thereby, in effect, telling the carriers where they must go to pump-out, the State has left the development and placement of pump-out

facilities to private enterprise and cooperation with municipalities. Private entrepreneurs have, in fact, developed and located (at the Ford Motor Company piers) such an arrangement for the Ford Motor Company Ships. (A. 111, 112). Others will undoubtedly be built soon. But, obviously, the private developers are awaiting the result of this appeal prior to actually constructing or developing any more such facilities.

The carriers related claim that Michigan's shore cities are not yet providing secondary treatment (Br. 35) presents an inaccurate and immaterial point. Since this is the same contention that is also the thrust of their "Point 7," the State will offer a full response under that designation.

VII.

APPELLANTS ARE NOT DENIED THEIR CONSTITUTIONAL RIGHT OF EQUAL PROTECTION OF THE LAW.

The appellants' contention that they are being denied the equal protection of the law by being held to higher requirements than municipalities proceeds from an inaccurate premise.

First of all, the State points out that there is an essential factual distinction between a shore-based point of discharge of wastes and a shipboard discharge of wastes into the Great Lakes. Michigan has the longest shoreline of any State except Alaska. The shore cities of Michigan not only discharge treated wastes into the waters of the Great Lakes, but these communities also take their drinking water from the Great Lakes. Great care is taken in the location of the water intakes to insure that no waste material

is discharged in such a way as to endanger the people who drink this water. The State constantly checks the quality of the water near any water intake. (A. 119). Therefore, if a shore-based discharge facility were to begin to pose any sort of problem in terms of a water intake (or a public bathing beach), the State could take immediate steps to alleviate the problem.

Vessels, however, do not discharge at a given specific point. As is indicated by the appellants' route maps (A. to Jurisdictional Statement) these boats are not sailing out in the middle of the lakes, but they are, rather, hugging the shoreline. Hence, the discharge of sewage from a boat could be anywhere along the shoreline. Such a discharge could, in fact, be *right over a muncipal water intake.* While the State can protect its citizens from the shore-based discharge by keeping a vigilant watch on how close such discharges are to intakes, there is no conceivable way in which the State can protect its citizens from a helter-skelter discharge of potentially dangerous wastes along the shoreline by the hundreds of boats which regularly sail along the shoreline. By requiring the boats to discharge into shore based facilities, the State can control the impact, if any, on shore based water intakes and bathing beaches. Therefore, in terms of public safety, there is significant and substantial difference between the two types of discharges. (A. 120, 121). Such a factual difference is recognized as a legitimate basis for a difference in treatment. *Morey* v. *Doud,* 354 US 457 (1957).

The second major inaccuracy in the appellants' argument is their misinterpretation of the record concerning secondary waste treatment by shore municipalities. In point of fact, the State of Michigan is making, and has made, great progress in converting such treatment plants into secondary treatment plants. As is set out in the testimony of Ralph

Purdy, substantial progress has been made by these municipalities and it is now estimated that all of Michigan's shore municipalities will have operational secondary waste treatment facilities by 1973-1974. (A. 132, 133, 134).

Thus, contrary to the appellants' assertions, this is an area in which two very different problems are essentially being treated the same way. There is, therefore, no equal protection problem presented on this record. *All watercraft traversing Michigan waters are subject to the same requirement regarding the discharge of sewage.*

VIII.

COMPLIANCE WITH MICHIGAN STATUTE WILL CAUSE NO DAMAGE TO APPELLANTS.

Despite appellants' arguments concerning Federal supremacy in the area we are discussing, we forcefully remind the Court that presently there are no Federal standards with which the Michigan statute may be in conflict. True, under the Water Quality Improvement Act the Environmental Protection Agency (EPA) is obligated to promulgate rules governing the standards for the control of sewage from vessels. However, this has not as yet been done, although notice thereof has been given. In the Federal Register, Vol. 36, No. 92—Wednesday, May 12, 1971, the EPA gave notice of its intent to promulgate rules and published the proposed rules. In the notice is contained the following extremely significant statement:

> "Holding tanks and other devices which preclude any discharge are presently on the market and are capable of providing compliance with the standards."

The notice further advises that under the statute any State may apply to the Administrator of the EPA for issuance of a regulation prohibiting discharge from a vessel of any sewage, and states:

> "No-discharge regulations issued by the Administrator will become effective no sooner than the effective dates of the initial standards and regulations issued under section 13(b). *Until such dates, the States have the authority to adopt and enforce their own statutes or regulations on this subject without Federal participation.*" (Emphasis added).

So what is the carriers' problem? They have already been told by the EPA that holding tanks or other no-discharge devices, as provided in the Michigan statute, will meet the Federal standards when same are promulgated. They have been advised that until EPA standards are promulgated the States are free to enforce their own statutes on this subject. Logically, it would seem to be good business to proceed to comply with the Michigan statute and thus be assured of being in conformity with any future EPA regulations. Or could it be that appellants are hopeful that EPA regulations will permit them to continue their pollution of the Great Lakes by requiring something less than a complete retention device?

Even this hope by the carriers could be in vain if a no-discharge order is issued by the Administrator. The Governor of the State of Michigan has requested a no-discharge order and same has been acknowledged by the Administrator. (See Appendix B, attached to this Brief).

Appellants further claim that by complying with the Michigan statute their role in the anti-pollution campaign could be stultified when other jurisdictions enacted legisla-

tion on this subject with which appellants would not be in compliance. In response the State of Michigan says that most of the so-called Great Lakes States have taken some form of action regarding discharge of sewage from vessels. The Port of Chicago has a no-discharge ordinance (A. 138), and the states of Wisconsin, Illinois, Indiana and New York have similar programs. The St. Lawrence Seaway Authority does not permit discharges in the seaway. (A. 99).

Appellants need have no fear based on the ground of possible diverse requirments among the States. *If they comply with the Michigan requirement of total retention of sewage they will be in compliance with the regulations of all other states, as well as with any forthcoming regulations of the EPA, for there can be no more restrictive requirement than complete retention and no discharge.*

In *Huron Portland Cement Co.* v. *Detroit*, 362 US 440 (1960), the Court stated in the words of Mr. Justice Stewart:

> "Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities concurrently with the federal government."

The foregoing words are of at least equal verity when the regulation concerns *the very water which tens of thousands of people drink.*

IX.

ADMIRALTY OR MARITIME LAW IS NOT INFRINGED UPON BY THE MICHIGAN STATUTE.

Appellants, expecially amici curiae, lean heavily upon the proposition that the Michigan statute is completely invalid as an infringement upon the exclusive federal domain of admiralty and maritime law. Too broadly do they interpret the decisions upon which they rely. Amici properly quoted from *The Lottawanna*, 88 US (21 Wall 558 (1874)), to the effect that the jurisdiction of the United States extends "to all cases of admiralty and maritime jurisdiction." Nonetheless, speaking in *Lottawanna*, Mr. Justice Bradley stated at 581:

> "Indeed, there is quite an extensive field of border legislation on commercial subjects (generally local in character) which may be regulated by State laws until Congress interposes, and thereby excludes further State legislation. Pilotage is one of the subjects in this category. So far as Congress has interposed, its authority is supreme and exclusive; but where it has not done so, the matter is still left to the regulation of State laws."

At that time in history Mr. Justice Bradley even left the purely maritime subject of pilotage, the guidance of a vessel, to state action until Congress acted. In the case at hand the subject matter, viz., discharge of sewage, cannot even remotely be connected with the operation of a vessel in the sense of an "admiralty" or "maritime" procedure. Lest it be otherwise interpreted the Michigan statute, in Section 11, defers to federal authorities. No federal regulation now being extant with reference to the discharge of sewage from vessels, the Michigan statute may stand.

In *Kelly* v. *Washington,* 302 US 1 (1937), (cited with approval in *Huron Cement* v. *Detroit,* 362 US 440) (1960), this court upheld a state vessel inspection act in an area wherein Congress had not acted. The Michigan statute is not in derogation of any federal licensing requirements which embrace sewage devices, and therefore no state-federal clash occurs. Indeed, federal inspection and approval of the sanitary devices mandated under Michigan law would take place. (A. 143, 144). Michigan is gratified that a federally-owned vessel of the Corps of Engineers has already been equipped with a total retention sewage system. (R. 58).

Amici place reliance on the recent Florida District Court decision by a three-judge court, *American Waterways Operators, Inc. et al.,* v. *Askew, et al.* No. 71-156-Civ-J (M.D. Fla., December 10, 1971), wherein the Florida statute regarding pollution by oil spills was held unconstitutional. The similarity between the Florida case and this cause is practically non-existent. Florida provided for liability for oil spills on a no-fault basis, contrary to certain exceptions contained in the Federal statute, and the whole state statute occupied an area (oil spills) which had been comprehensively covered by the Federal statute. In the case at bar, we have no Federal regulations with which there may be a conflict and, indeed, federal authorities have advised appellants and others similarly situated that states may enact and enforce their own statutes until the coming of Federal regulations. With all deference to the Federal District Court of Florida, we point out that *American Waterways* is only one District Court opinion vis-a-vis that of another District Court—on dissimilar facts.

Michigan is somewhat surprised at the position taken by foreign amici inasmuch as the problem which the Michigan requirement seeks to help solve has not been aggravated by

foreign vessels plying our waters. In most cases such vessels, in order to comply with complete retention of sewage requirements, have taken portable holding tanks aboard at Montreal, made their trip into the Great Lakes, and then dropped the tanks off at Montreal on the way out. (A. 114).

SUMMARY OF ARGUMENT

1. The Michigan Statute, Act 167, Public Acts of 1970, is a legitimate exercise of the State's police power in that it is a measure designed to reduce pollution of Michigan waters of the Great Lakes by prohibiting the discharge of sewage into said waters, and therefore is a measure of great significance in protecting the health, safety, and welfare of the residents of this state.

2. The Michigan statute places no undue burden upon interstate or foreign commerce, and is within the ambit of authority which may be exercised by the states in accordance with this Court's decision in *Huron Portland Cement Company* v. *Detroit*, 362 US 440 (1960).

3. The District Court properly abstained from deciding the merits of this cause, no arrests or harassment under the statute having occurred, and the courts of Michigan not having interpreted the precise meaning of the language contained in the statute. Thus a potential conflict with federal interpretation was, at least for the present, avoided.

4. There is no conflict between State and Federal law and regulations inasmuch as no Federal regulations have been promulgated and until same are enacted the states are free to legislate on the matter of discharge of sewage

from vessels. Federal authorities have already advised appellants and others likewise situated that devices such as those prescribed by the Michigan statute will meet Federal standards when same are promulgated. (18 CFR Part 640 as published in the Federal Register Vol. 36, No. 92 — Wednesday, May 12, 1971). Federal regulations, when same are finally promulgated, will not be effective for five years after the effective date thereof. Therefore, no supremacy clause question is now present in this case.

5. The equal protection clause of the Constitution is not violated inasmuch as the Michigan statute applies equally to all watercraft plying Michigan waters. The fact that other sources of Great Lakes pollution exist and are not subject to the statute does not vitiate a law devoted to the disposition of human waste from vessels.

6. As permitted under the Water Quality Improvement Act, the Governor of the State of Michigan has applied to the Administrator of the Environmental Protection Agency for a "no discharge" order. No action will be taken upon this request until the EPA rules on sewage from vessels are promulgated and made effective. If the Governor's request is ultimately granted, appellants' bases for complaint in this cause are purely academic and moot. (Appendix B to this Brief)

CONCLUSION

Wherefore, appellees urge the Court to affirm the decision of the three-judge District Court heretofore entered in this cause.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LAKE CARRIERS' ASSOCIATION and AMERICAN STEAMSHIP COMPANY, et al., Plaintiffs, vs. RALPH A. MacMULLAN, et al., Defendants.	CIVIL ACTION NO. 36194

MEMORANDUM OPINION

Before EDWARDS, Circuit Judge, and KEITH and PRATT, District Judges.

PRATT, District Judge:

Plaintiffs in this proceeding are the Lake Carriers' Association and 19 of its 21 member companies who own and operate Great Lakes cargo vessels. Defendants are the Attorney General of the State of Michigan, the Michigan Department of Natural Resources and its Director and the Michigan Water Resources Commission and its Executive Secretary.

The complaint seeks a declaratory judgment holding that the Michigan Water Pollution Act of 1970 (Act 167 of Public Acts of 1970) is constitutionally infirm and conflicts with federal legislation, and correspondingly, re-

quests that the State of Michigan be enjoined from enforcing that Act.

A three judge Court was convened pursuant to Section 2284 of Title 28 of the United States Code and a hearing was conducted on April 26 and 27, 1971.

The plaintiffs present five major issues as the basis for relief:

1. That the federal government has pre-empted the field of pollution control in the waters of the Great Lakes and that the Michigan Water Pollution Act conflicts with a federal statute, specifically (Water Pollution Control Act as amended by the Water Quality Improvement Act of 1970, 33 U.S.C. Sec. 1151 et seq.); the said federal statute manifests the intention of the federal government to occupy the field exclusively; and that federal vessel inspection laws, administered by the U. S. Coast Guard, preclude state prescription of shipboard equipment.

2. That the Michigan Water Pollution Act places an undue burden on interstate commerce.

3. That the Michigan Water Pollution Act interferes materially with uniform maritime law.

4. That the Michigan Water Pollution Act denies plaintiffs due process and the equal protection of the laws.

5. That the language and provisions of the Michigan Water Pollution Act are unconstitutionally vague and, thus, unenforceable.

Great Lakes shipping can be characterized as a large, vital and sophisticated industry. It traverses all of the

Great Lakes, the connecting waterways and tributaries and touches upon the states of Minnesota, Wisconsin, Illinois, Indiana, Michigan, Ohio, Pennsylvania and New York and the Canadian provinces of Ontario and Quebec. The advent of the St. Lawrence Seaway System provides an international flavor to shipping on the Great Lakes.

As an example of the size and scope of the industry, as of January 1, 1970, there were a total of 442 vessels in excess of 1,000 tons on the Great Lakes. Of this total, 263 were vessels of United States Registry, having a combined tonnage of 1,802,776 gross tons, and 179 were vessels of Canadian Registry having a combined tonnage of 1,576,165 gross tons. Flow charts indicate that the total commerce of the lakes in 1964 was 210,830,576 short tons with the primary commodities being iron ore, coal, grain, stone, petroleum, cement and sand and gravel. Of this commerce, about one-third (approximately 72 million short tons) utilizes or touches Michigan ports. A resume of trade patterns and courses shows that Great Lakes cargo vessels cross and criss-cross during the shipping season from a great variety of ports within the Great Lakes waterway system, and may enter a particular state's waters frequently without touching at a port in that state. Generally, if recommended navigational courses are followed, the vessels do not, while traversing open waters come within three miles of land except when entering or leaving a port or when in a connecting waterway.

A typical or average Great Lakes cargo vessel would be between 500 and 600 feet in length, have a gross tonnage of 7,500 tons and a carrying capacity of 12,000 gross tons. It is a flat-decked vessel except for the "houses" fore and aft where are located the crew quarters, machinery, supplies, navigational and other equipment necessary to the operation of the vessel. The center length of the

vessel is devoted to cargo. Crew sizes range from 30 to 35 men per vessel and it is estimated each man daily generates 125 gallons of liquid waste (including wash and bathing water and sanitary flush water).

Recognizing the need for pollution control devices and systems, a part at least of the Great Lakes shipping industry has taken some steps in the direction of reducing the discharge of pollutants. Approximately 30 ships have installed a macerating-chlorinating system and another 26 (including four Canadian registry vessels) have installed biogest systems. Other systems are also being tried emperically aboard some vessels, and are of the incinerating or of the "package-treatment plant" type.

It is within the foregoing context that the State of Michigan enacted the Water Pollution Control Act of 1970, and began its implementation by, first enforcing the requirements relating to pleasure craft and then by approaching the owners and operators of Great Lakes cargo vessels in order to obtain compliance with the provisions of the Act.

The Water Pollution Control Act of 1970, (a copy of which is attached hereto as Appendix A) as particularly pertinent here, provides that:

> Sec. 3. (1) A person shall not place, throw, deposit, discharge or cause to be discharged into or onto the waters of this state, any litter, sewage, oil or other liquid or solid materials which render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes.

and,

> Sec. 4. (2) A person owning, operating or otherwise concerned in the operation, navigation or management of a watercraft having a marine toilet shall not own, use or permit the use of such toilet on the waters of this state unless the toilet is equipped with 1 of the following pollution control devices:
>
> (a) A holding tank or self-contained marine toilet which will retain all sewage produced on the watercraft for subsequent disposal at approved dockside or onshore collection and treatment facilities.
>
> (b) An incinerating device which will reduce to ash all sewage produced on the watercraft. The ash shall be disposed of onshore in a manner which will preclude pollution.
>
> Sec. 11. Any person who violates any provision of this act is guilty of a misdemeanor and shall be fined not more than $500.00. To be enforceable, the provision or the rule shall be of such flexibility that a watercraft owner, in carrying out the provision or rule, is able to maintain maritime safety requirements and comply with the federal marine and navigation laws and regulations.

From the above provisions, it appears that the legislature of the State of Michigan sought to draw a distinction between the discharge of "noxious" materials and the discharge of "sewage" (defined in Section 2(d) as ".... all human body wastes, treated or untreated."), in the latter instance requiring either a holding tank or an incinerating device, whereas in the former the prohibition does not proscribe the discharge of "treated" material.

As a result of the overtures of state officials, with the aim of establishing voluntary compliance within a reasonable time, some ship owners have installed holding tanks to control sewage discharge; for example, Ford Motor Company has installed two 1,000 gallon holding tanks on each of its six vessels at a cost of approximately $20,000.00 per vessel. The Ford vessels' holding tanks are pumped out at the Ford dock when the ships return to their port by the utilization of septic tank pump-out trucks at a cost of between $50.00 and $70.00 per ship.

The latter finding points up a significant feature, that is, that Michigan has, as yet, provided no pump-out facilities at any of its ports, although it is anticipated that arrangements with municipal authorities or others (including dock owners and ship owners or operators with their own docks) will establish a network of such facilities.

Against this background is superimposed the entry of the federal government by virtue of the Water Quality Improvement Act of 1970, supra, which has as one of its major purposes pollution control of navigable waters, including the Great Lakes system.

In paraphrase, the federal Act provides that as soon as possible after April 3, 1970, the Secretary of Interior shall promulgate federal standards of performance for marine sanitation devices which shall be designed to prevent the discharge of untreated or inadequately treated sewage into or upon the navigable waters of the United States. (Section 1163 (b)(1).) The Act also provides that initial standards and regulations shall become effective for new vessels two years after promulgation and for existing vessels five years after promulgation. (Section 1163 (c)(1).) Subsection (f) of Section 1163 prohibits

any state from enforcing any statute or regulation with respect to the design, manufacture, or installation or use of any marine sanitation device on any vessel subject to the section after the effective date of the initial standards and regulations promulgated under the section. A state may, however, apply to the Secretary for a regulation prohibiting the discharge of *any* sewage into waters of that state. (Emphasis supplied.)

There is no dispute that the vessels and waters covered by the Federal Act are the same vessels and waters which are the subject matter of this case. The cause of plaintiffs' anxiety and apprehension is not, however, limited to the alleged conflict between the Federal Act and the Michigan Act. For example, pollution control of the waters of the Great Lakes has been a matter of discussion between the governments of the United States and Canada and specific reference has been made to the problem of achieving compatible regulations governing waste disposal by commercial vessels. (Ex. 23, Communique of the Canada/United States Ministerial Meeting on Great Lakes Pollution, June 23, 1970); the Canadian government has circularized to the shipping industry proposed regulations governing sewage and garbage disposal on the Great Lakes waters within its boundaries (Ex. 22); in early 1968, Federal authorities met with representatives of Lake Michigan states regarding pollution control of that Lake and it was there recognized that sewage disposal directly into Lake Michigan waters was a distinct threat to the quality of the Lake (Ex. 21); a bill has been introduced into the Wisconsin legislature which purports to regulate sewage discharge from commercial vessels into the waters of that state (Exhibit D).

Adding to the uncertainties created by the foregoing is the expressed fear of the plaintiffs that Michigan may,

administratively or judicially, interpret its statutes to require that Great Lakes vessels install huge holding tanks of a capacity (40,000 gallons) that would retain for eventual pumping out *all* materials, fluids and substances generated by and on a vessel.

Inherent, then, in this situation, assert the plaintiffs, is the real possibility that each of the governmental units involved, if left to their own devices, would promulgate different, conflicting standards, prohibitively costly and structurally dangerous and, presumably, each statute with a criminal penalty.

But with a recitation of what is, should be coupled a recitation of what is not. In that balance sheet lies the real crux of the issues presented and the role of this Court.

The pollution of our environment has become a major problem of our society. There is hardly an industry, a governmental unit, a citizens' organization — nor even a person — who is not daily confronted with dire warnings regarding the danger confronting our ecology if corrective and reparative steps are not taken immediately. There are few dissenters and conflicts appear to arise only as to timetables, methods and expense. Investigations, studies, reports, surveys and conferences abound.

Michigan has chosen to promulgate a program, which is original within the Great Lakes region as it respects lakes pollution. No other state, province or national government has, as yet, instituted a Great Lakes pollution control program although certainly each is involved and concerned. The significant factor is, however, that the plaintiffs here request relief on the basis of an *anticipation* that other governmental units will act, presumably in the

imminently near future and that such action will in fact conflict with Michigan standards.

Further, although the plaintiffs asserted that the Michigan statute might or could be interpreted to require holding tanks of 40,000 gallon capacity, there is no substantial grounds for that assertion, particularly in view of the stated position of Michigan authorities that the holding tank provision is aimed at the elimination of the practice of discharging *human wastes* into Michigan waters.

Primary in the factual picture and, therefore, paramount in the Court's consideration, is the attitude of Michigan authorities who seek the cooperation of the industry in the implementation of its program and have not instigated, nor does it appear, threatened criminal prosecutions.

It is this consideration that gives us the starting point of our discussion of the issues.

Wilson v. *Schnettler*, 365 U.S. 381, provides a succinct guideline regarding the role of the federal courts vis a vis state courts, when Justice Whittaker wrote (at page 385):

> There is still another cardinal reason why it was proper for the District Court to dismiss the complaint. We live in the jurisdiction of two sovereignties. Each has its own system of courts to interpret and enforce its laws, although in common territory. These courts could not perform their respective functions without embarrassing conflicts unless rules were adopted to avoid them. Such rules have been adopted. One of them is that an accused "should not be permitted to use the machinery of one sovereignty to obstruct his trial in

> the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial." *Ponzi* v. *Fessenden*, 258 U.S. 254, 260. Another is that federal courts should not exercise their discretionary power "to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent . . . ." *Douglas* v. *City of Jeannette, supra*, at 163.

A later exposition of the principle is contained in *Dombrowski* v. *Pfister*, 380 U.S. 479, where it was said (pages 484, 485):

> ". . . . considerations of federalism have tempered the exercise of equitable power, for the Court has recognized that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework. It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings."

The impact of *Wilson* and *Dombrowski* is a pervading one, particularly, as here, where dealing as we are with a penal statute, prosecution has not been instituted and threatened prosecution does not appear imminent. (See *Doe* v. *Randall*, 314 F. Supp. 32, D. Minnesota, aff'd *Hodgson* v. *Randall*, 39 L.W. 3505.)

Nor is there any intimation that the "necessary operation" of state court machinery would prevent a fair trial.

On the contrary, there is every reason to believe that the Michigan court system, with its declaratory judgment procedures (Michigan Court Rules, GCR 1963, Section 521) provide full and adequate machinery to insure a fair hearing of plaintiffs' cause. More importantly, there is every reason to believe that the Michigan courts are eminently qualified to apply constitutional standards studiously and assiduously in their determinations regarding the validity of state statutes.

Reviewing the issues framed previously, there appears to this Court to be compelling reasons to abstain from consideration of the matter in its present posture.

With regard to pre-emption, the Supreme Court in *Swift & Co.* v. *Wickham,* 382 U.S. 111, held that Supremacy Clause cases are not within the purview of a three judge court.

With regard to the other issues, the lack of a justiciable controversy precludes entry of this Court into the matter. No prosecution is pending, nor threatened which would realistically infer that plaintiffs in a trial of a case would be denied the benefits of the Due Process and Equal Protection clauses or that a State court would not consider the other constitutional issues with circumspection and thoroughness in the usual and normal course.

An overview of the factual situation presented by the evidence in this case compels but one conclusion: that the plaintiffs here are seeking an advisory opinion that would have the effect of prohibiting any state action in the field of Great Lakes water pollution until such time as the federal government manifests its intention and takes control. This the Court declines to do, especially upon reflection of the clear direction given by the Supreme Court in

Public Service Commission of Utah. et al., v. *Wycoff Company, Inc.*, 344 U. S. 237, which involved an interestingly similar situation.

Summarizing the case before it, the Supreme Court said (page 245):

> "In the first place, this dispute has not matured to a point where we can see what, if any, concrete controversy will develop. It is much like asking a declaration that the State has no power to enact legislation that may be under consideration but has not yet shaped up into an enactment."

And went on to say, (pages 247, 248):

> "Declaratory proceedings in the federal courts against state officials must be decided with regard for the implications of our federal system. State administrative bodies have the initial right to reduce the general policies of state regulatory statues into concrete orders and the primary right to take evidence and make findings of fact. It is the state courts which have the first and the last word as to the meaning of state statutes and whether a particular order is within the legislative terms of reference so as to make it the action of the State. We have disapproved anticipatory declarations as to state regulatory statutes, even where the case originated in and was entertained by courts of the State affected. *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450. Anticipatory judgment by a federal court to frustrate action by a state agency is even less tolerable to our federalism. Is the declaration contemplated here to be *res judicata*, so that the Commission cannot hear evidence and decide any matter for itself? If so, the federal court has virtually lifted

the case out of the State Commission before it could be heard. If not, the federal judgment serves no useful purpose as a final determination of rights.

The procedures of review usually afford ample protection to a carrier whose federal rights are actually invaded, and there are remedies for threatened irreparable injuries. State courts are bound equally with the federal courts by the Federal Constitution and laws. Ultimate recourse may be had to this Court by certiorari if a state court has allegedly denied a federal right.

In this case, as in many actions for declaratory judgment, the realistic position of the parties is reversed. The plaintiff is seeking to establish a defense against a cause of action which the declaratory defendant may assert in the Utah courts. Respondent here has sought to ward off possible action of the petitioners by seeking a declaratory judgment to the effect that he will have a good defense when and if that cause of action is asserted. Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action. Federal courts will not seize litigations from state courts merely because one,

> normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law. *Tennessee* v. *Union & Planters' Bank*, 152 U.S. 454; *The Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22; *Taylor* v. *Anderson*, 234 U.S. 74."

For the foregoing reasons, this Court will abstain from further consideration of the matter.

The Court is mindful of the recent action of the Environmental Protection Agency which on May 12, 1971, published a "Notice of Proposed Rule Making". The Notice announces that the Agency proposed to amend 18 CFR Part 640 by the promulgation of marine sanitation standards which would permit the use of described treatment devices. Holding tanks or incinerating devices are not required under the proposed standards. The Notice also provides that interested persons may submit views, comments and recommendations concerning the proposed standard to the Agency within 45 days of publication of the Notice.

Defendants have conceded that pre-emption would take place when the initial standards and regulations become effective. Certainly the current action of the Environmental Protection Agency must be carefully considered by the defendants in the interpretation and enforcement of the Michigan statute. This circumstance serves to emphasize the reluctance and declination of the Court to intrude into a matter which is yet unformed.

The temporary restraining order heretofore entered is dissolved and the complaint dismissed without prejudice

to plaintiffs to institute other appropriate judicial proceedings.

George C. Edwards, Jr. /s/
GEORGE C. EDWARDS, JR.
United States Circuit Judge

Damon J. Keith /s/
DAMON J. KEITH
United States Circuit Judge

Philip Pratt /s/
PHILIP PRATT
United States Circuit Judge

Dated: July 12, 1971.

STATE OF MICHIGAN
Act 167, PUBLIC ACTS OF 1970

AN ACT to regulate the disposal of oil and sewage from watercraft; and to prohibit littering of waterways.

The People of the State of Michigan enact:

Sec. 1. This act shall be known and may be cited as the "watercraft pollution control act of 1970".

Sec. 2. As used in this act:

(a) "Act" means Act No. 245 of the Public Acts of 1929, as amended, being sections 323.1 to 323.12a of the Compiled Laws of 1948.

(b) "Commission" means the water resources commission of the department of natural resources.

(c) "Litter" means all rubbish, refuse, waste material,

garbage, offal, paper, glass, cans, bottles, trash, debris or other foreign substances of every kind and description.

(d) "Sewage" means all human body wastes, treated or untreated.

(e) "Oil" means oil of any kind or in any form, including but not limited to petroleum, fuel oil, sludge and oil refuse.

(f) "Marine toilet" means any toilet on or within a watercraft used to discharge sewage.

(g) "Watercraft" means any contrivance used or capable of being used for navigation upon water, whether or not capable of self-propulsion, including foreign and domestic vessels engaged in commerce upon the waters of this state, passenger or other cargo-carrying vessels and privately owned recreational watercraft.

(h) "Waters of this state" means all of the waterways on which watercraft may be used or operated including, but not limited to, the Great Lakes and connecting waterways under the jurisdiction of this state.

(i) "Person" means an individual, partnership, firm, corporation, association or other entity.

(j) "Discharge" means any spilling, leaking, pumping, pouring, emitting, emptying or dumping.

Sec. 3. (1) A person shall not place, throw, deposit, discharge or cause to be discharged into or onto the waters of this state, any litter, sewage, oil or other liquid or solid materials which render the water unsightly, noxious or otherwise unwholesome so as to be deterimental to the public

health or welfare or to the enjoyment of the water for recreational purposes,

(2) It is unlawful to discharge, dump, throw or deposit garbage, litter, sewage or oil from a recreational, domestic or foreign watercraft used for pleasure or for the purpose of carrying passengers, cargo or otherwise engaged in commerce on the waters of this state.

Sec. 4. (1) Any pleasure or recreational watercraft operated on the waters of this state, which is moored or registered in another state or jurisdiction, if equipped with a pollution control device approved by that jurisdiction, may be approved by the commission to operate on the waters of this state.

(2) A person owning, operating or otherwise concerned in the operation, navigation or management of a watercraft having a marine toilet shall not own, use or permit the use of such toilet on the waters of this state unless the toilet is equipped with 1 of the following pollution control devices:

(a) A holding tank or self-contained marine toilet which will retain all sewage produced on the watercraft for subsequent disposal at approved dockside or onshore collection and treatment facilities.

(b) An incinerating device which will reduce to ash all sewage produced on the watercraft. The ash shall be disposed of onshore in a manner which will preclude pollution.

Sec. 5. All marinas operating on the bottomlands of the Great Lakes under lease from the department of natural resources under Act No. 247 of the Public Acts of 1955, as amended, being sections 322.701 to 322.715 of the Compiled Laws of 1948 and all those operating on the bottomlands

of inland lakes and streams under permit from the department of natural resources under Act No. 291 of the Public Acts of 1965, as amended, being sections 281.731 to 281.752 of the Compiled Laws of 1948 if selling marine fuel or otherwise providing a dockside service center shall provide pump-out facilities approved by the department of public health for marine toilet holding tanks on pleasure watercraft. Failure to comply with the provisions of this section by any marina owner or operator is just cause for revoking the permit or prohibiting the issuance of a lease for the use of the state's bottomlands. The owner or operator of a marina shall be given written notice and opportunity of hearing before any action is taken.

Sec. 5a. All marinas owned and/or operated or leased by the Michigan waterways commission shall by July, 1971 provide pump-out facilities approved by the department of public health for marine toilet holding tanks or pleasure and commercial watercraft.

Sec. 5b. Any marina or dock which is equipped to handle watercraft of the size capable of being equipped with a marine toilet, owned, leased or operated by the state, any of its departments or agencies or any local unit of government shall maintain a pumping station for pumping out the holding tank required on watercraft.

Sec. 5c. Any marina or dock that holds 15 watercraft or less is exempt from section 5 of this act.

Sec. 6. An applicant for a boat plate registration for a watercraft pursuant to section 1a of Act No. 70 of the Public Acts of 1911, as amended, being section 207.51a of the Compiled Laws of 1948 shall disclose at such time to the commission whether the watercraft has in or on it a marine toilet, and if so, whether the toilet is equipped with a

pollution control device as required by this act. The commission may request the secretary of state to provide it with the name of registrant whose registration indicates the absence of such pollution control device on a marine toilet.

Sec. 7. (1) A person owning, operating or otherwise concerned in the operation, navigation or management of a watercraft operating on the waters of this state shall not discharge or permit the discharge of oil or oily wastes from the watercraft into or onto the waters of this state if the oil or oily wastes threaten to pollute or contribute to the pollution of the waters or adjoining shorelines or beaches.

(2) The owner or operator of any watercraft who, whether directly or through any person concerned in the operation, navigation or management of the watercraft, discharges or permits or causes or contributes to the discharge of oil or oily wastes into or onto the waters of this state or adjoining shorelines or beaches shall immediately remove the oil or oily wastes from the waters, shorelines or beaches. If the state removes the oil or oily wastes which were discharged by an owner or operator, the watercraft and the owner or operator are liable to the state for the full amount of the costs reasonably incurred for its removal. The state may bring action against the owner or operator to recover such costs in any court of competent jurisdiction.

Sec. 8. All watercraft moored, operated or located upon the waters of this state are subject to inspection by the commission, any lawfully designated agent or inspector thereof or any peace, conservation or police officer for the purpose of determining if the watercraft is equipped in compliance with the requirements of this act. The commission may inspect marinas and other waterside facilities used by watercraft for launching, docking or mooring pur-

poses to determine if they are equipped with trash receptacles, sewage disposal equipment or both. Commercial docks and wharfs designed for receiving and loading cargo and/or freight from commercial watercraft must furnish facilities, if determined necessary, as prescribed by the commission, to accommodate discharge of sewage from heads and galleys, and for deposit of litter, garbage, trash, or bilge waters from the watercraft which utilize the docks or wharfs.

Sec. 9. The state fully reserves to itself the exclusive right to establish requirements with reference to the disposal or discharge of sewage, litter and oil from all watercraft. In order to assure statewide uniformity, the regulation by any political subdivision of the state of waste disposal from watercraft is prohibited.

Sec. 10. The commission may promulgate all rules necessary or convenient for the carrying out of duties and powers conferred by this act.

Sec. 11. Any person who violates any provision of this act is guilty of a misdemeanor and shall be fined not more than $500.00. To be enforceable, the provision or the rule shall be of such flexibility that a watercraft owner, in carrying out the provision or rule, is able to maintain maritime safety requirements and comply with the federal marine and navigation laws and regulations.

Sec. 12. This act shall take effect January 1, 1971.

This act is ordered to take immediate effect.

APPENDIX "B"

ENVIRONMENTAL PROTECTION AGENCY

Washington, D.C. 20460
October 12, 1971

Office of the Administrator

Honorable William G. Milliken
Governor of Michigan
Lansing, Michigan 48903

Dear Governor Milliken:

Thank you for your letter in which you requested this Agency to issue a regulation completely prohibiting the discharge from all vessels of any sewage, whether treated or not, into Michigan's portion of the Great Lakes or connecting channels thereof.

Any action by me on your request would be premature until such time as I issue final regulations setting standards for marine sanitation devices under Section 13. As you know, at present only proposed standards have been issued. We have received a large number of comments on the proposed regulation. We have also conducted five public meetings relating to this subject and the statements that were presented at these meetings have become a part of the official record. My staff is now itemizing and summarizing the concerns and recommendations that were contained in the comments and were presented at the public meetings. I will review this information and then publish an initial regulation on the control of vessel wastes pursuant to the mandate of Section 13 of P. L. 91-224.

We share your concern with protecting and enhancing the water quality of the Great Lakes. Section #13(f) of the Federal Water Pollution Control Act authorizes me to issue "no-discharge" regulations for vessels in particular bodies of water provided that it can be shown that such a regulation is necessary in order to achieve water quality standards. I will be pleased to issue a no-discharge regulation covering any portion of Michigan's part of the Great Lakes, to the extent that you supply me with information needed to support this determination mandated by the law.

Sincerely yours,
William D. Ruckelshaus /s/
WILLIAM D. RUCKELSHAUS
Administrator

AMICUS CURIAE BRIEF

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SUPREME COURT U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 422

LAKE CARRIERS' ASSOCIATION and AMERICAN STEAMSHIP COMPANY, et al.,

Appellants,

vs.

RALPH A. MACMULLAN, Individually and as Director, Michigan Department of Natural Resources, et al.,

Appellees.

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

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IN THE

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OCTOBER TERM, 1971

No. 422

LAKE CARRIERS' ASSOCIATION and AMERICAN STEAMSHIP COMPANY, et al.,

Appellants,

vs.

RALPH A. MACMULLAN, Individually and as Director, Michigan Department of Natural Resources, et al.,

Appellees.

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

Interest of the *Amicus*

The State of New York has long been a leader in the enactment of legislation designed to protect the health and welfare of its citizens from the harmful effects of pollution. One such statute is Navigation Law § 33-c, enacted by the New York State Legislature in 1966 (N.Y. Laws, 1966, Chap. 897), an act similar in scope and effect to Act 167 of the Michigan Public Acts of 1970, the statute under consideration here. The constitutionality of Navigation Law § 33-c was recently upheld in *New York State Water-*

ways Ass'n, Inc., et al., v. *Diamond, et al.*, —— F. Supp. —— (W.D.N.Y., January 12, 1972, BURKE, D.J.).*

The New York statute prohibits the placing, throwing, deposit or discharge into the waters of New York State, from any watercraft, marina or mooring, of any "sewage or other liquid or solid materials which render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes." It prohibits the use of marine toilets on watercraft on the water of New York State "unless the toilet is equipped with facilities that will adequately treat, hold, incinerate or otherwise handle sewage in a manner that is capable of preventing water pollution, as required by this section."

This provision, which became effective on March 1, 1970 after a substantial "lead-time" for boat owners and operators to comply, represents one of the most important strides taken in the ongoing battle against the pollution of our lakes, streams and rivers. It was prompted by a legislative finding that "[t]he protection of the safety, health, cleanliness and usefulness of the waters of the state requires that operation of watercraft, and marinas serving such vessels, be regulated in the interest of public health and public enjoyment." Prior to the enactment of § 33-c, there was no regulation in this State of toilets on watercraft, and as a result substantial quantities of raw sewage were deposited into waterways throughout the State. The severely harmful effects of this dumping of sewage scarcely require documentation, and it is our position that the Legislature was well within its ample authority under the State's police power to forbid the continuation of such discharges, just as it has done with regard to discharges from commercial, residential and industrial sources on shore.

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* The full text of Navigation Law § 33-c, and the decision of the District Court, are contained in the Appendix to this brief.

Because of New York's vital concern with the preservation and protection of its waters, and in view of the similarity between the Michigan statute under review and § 33-c, we view the outcome of this litigation with deep interest. We are concerned with the effect that appellants' challenge to the Michigan Act, if successful, might have on New York's efforts to protect its citizens from the harmful pollution caused by unrestricted dumping of untreated sewage into our waters. The decision in this litigation may have a substantial effect on the health, welfare and legal rights of the citizens of New York State and our sister states.

The State of New York, therefore, respectfully files this brief as *amicus curiae* pursuant to Rule 42 of the Revised Rules of this Court.

ARGUMENT

Act 167 of the Michigan Public Acts of 1970 does not operate in a field preempted by Congress, nor does it unconstitutionally interfere with interstate commerce.

A.

Appellants' contention that the Federal Water Pollution Control Act, 33 U.S.C. §§ 1151 *et seq.*, evidences the Congressional intent to preempt this field is not supported by the facts. Preemption can only occur where there is either "such actual conflict between the two schemes of regulation that both cannot stand in the same area [or] evidence of a Congressional design to preempt the field." *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 141.

The Federal Act provides (33 U.S.C. § 1163 [f]) that no State shall adopt or enforce its own laws concerning marine sanitation devices "[a]fter the effective date of the initial standards and regulations promulgated under this section"; § 1163 (c) (1) provides that such initial standards and regulations shall become effective two years after

promulgation for new vessels and five years after promulgation for existing vessels. The Federal standards have not as yet even been promulgated. Thus, by the unequivocal language of the Act itself, Congress has decreed that there will be no preemption of any State's regulation of any existing vessels for at least five years. The proposed initial Federal regulations and standards specifically provide that "[u]ntil such dates, the States have the authority to adopt and enforce their own statutes or regulations on this subject * * *." 18 CFR, Part 640, Fed. Reg., Vol. 36, No. 92, May 12, 1971, p. 8740. In the face of the foregoing, the argument that the intent of Congress was to preempt the field of marine sanitary regulation prior to such effective dates is utterly unpersuasive.

Nor is appellants' assertion that the Federal and State Acts are in conflict helpful to them. The State's standards on maritime sanitary devices cannot be in conflict with federal regulations that will not take effect until *five years* from now. When that occurs, State marine sanitation laws will be superseded, but in the meantime only State regulations will be in effect. Since neither set of standards will be operative simultaneously, there can be no showing that compliance with both Federal and State law would be a physical impossibility, *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520; *Morgan* v. *Virginia*, 328 U.S. 373; *Union Bridge Co.* v. *United States*, 204 U.S. 364, nor can it be demonstrated that the State Act could not be enforced without impairing the effectiveness of the Federal Act. It is thus clear that there is no "such *actual* conflict between the two schemes of regulation that both cannot stand in the same area", *Florida Lime and Avocado Growers* v. *Paul*, *supra*, emphasis supplied. See also *A. E. Nettleton Co.* v. *Diamond*, 264 N.E. 2d 118, 27 N.Y. 2d 182 (1970), app. dism. *sub. nom. Reptile Products Ass'n* v. *Diamond*, 401 U.S. 969 (1971) and *Palladio, Inc.* v. *Diamond*, 321 F. Supp. 630 (S.D.N.Y., 1970), aff'd 440 F. 2d 1319, cert. den. —— U.S. —— (decided Dec. 7, 1971).

There is no support for the argument that the States are powerless to act to protect the health and welfare of their residents during the period prior to the effectiveness of Federal standards. The doctrine of police power gives the State the right to enact legislation such as that challenged here. "The police power of the State is the least limitable of all the powers of government." *Matter of Engelsher* v. *Jacobs,* 157 N.E. 2d 626, 627, 5 N.Y. 2d 370 (1959), cert. den. 360 U.S. 902. This statute represents a reasonable effort by the State to protect its waters from pollution. Indeed, the Federal Water Pollution Control Act specifically recites and reiterates the traditional powers and responsibilities of the states in the cleaning and protection of their waterways. "In connection with the exercise of jurisdiction over the waterways of the Nation * * *, it is declared to be the policy of Congress to recognize, preserve and protect the primary responsibilities and rights of the States in preventing and controlling water pollution, * * *", 33 U.S.C. § 1151 (b); "Nothing in this chapter shall be construed as impairing or in any manner affecting the right or jurisdiction of the States with respect to the waters * * * of such States.", *ibid.* (c); "The Secretary shall encourage cooperative activities by the States for the prevention and control of water pollution; * * *", *ibid.* § 1154(a); "* * * State and interstate action to abate pollution of interstate or navigable waters shall be encouraged and shall not * * * be displaced by Federal enforcement action", *ibid.* § 1160(b). In the face of this overwhelming showing of Congressional deference to the States, the claim of preemption falls of its own weight.

Federal preemption of the "historic police powers of the States" will not be decreed "unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.,* 331 U.S. 218, 230. No such purpose can be shown here. See also, *Department of Health* v. *Passaic Valley Sewage Commission,* 242 A. 2d 675, 679-680, 100 N.J. Super. 540 (1968), aff'd 253 A. 2d 577, 105 N.J. Super.

565: "[N]o legislation is extant which has whittled away the power of the State or its agency, the Department, so as to deprive the Department of jurisdiction over pollution prevention in the New Jersey waters of upper New York Bay * * *."; *Albina Engine and Machine Works, Inc.* v. *Hershey Chocolate Corp.*, 295 F. 2d 619, 622 (9th Cir. 1961): "We find no conflict nor any Federal intent in preventing the City of Portland from legislating in this area [regulation of welding or burning aboard ships] in which the City's interest so obviously appears."

B.

Appellants' claim that the Michigan Act places an unconstitutional burden on interstate commerce is not maintainable. The courts have consistently upheld state enactments against this claim in the absence of a firm showing "of a Congressional purpose to create an exclusive system of regulation." See *Swift & Co.* v. *Wickham*, 230 F. Supp. 398, 406 (S.D.N.Y., 1964), cert. den. 385 U.S. 1036 (upholding State regulation of weights of fowl despite Federal Poultry Products Inspection Act); *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (*supra*). Also see *A. E. Nettleton Co.* v. *Diamond*, 264 N.E. 2d 118, *supra*, and *Palladio, Inc.* v. *Diamond*, 321 F. Supp. 630, *supra*, both upholding § 358-a of New York's Agriculture and Markets Law (regulating the sale in the State of products made from skins of animals facing extinction, where the State list of such animals was far broader than the Federal list) as against the claim that it unduly interfered with interstate commerce. The test, as expressed in the *Florida Lime* case, *supra*, is that "federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons —either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." 373 U.S. at 142.

Appellants attempt to meet this test by arguing that the Michigan statute represents an effort by the State to inter-

fere with the Federal government's jurisdiction over maritime matters. But this is utterly without merit, since Act 167 is simply a water pollution control statute, and not a maritime or navigation statute as appellants contend. Its sole purpose is to help abate the serious pollution of Michigan waterways in order to protect the health of the State's citizens and enhance the cleanliness of the areas affected. This is well within the purview of the State's traditional police power. See *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. [illegible]442:

> "The ordinance [a Smoke Abatement Code] was enacted for the manifest purpose of promoting the health and welfare of the city's inhabitants. Legislation designed to free from pollution the very air people breath clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the Federal Government."

In that case a local Smoke Abatement Code that applied to ship's boiler stacks, where the boilers had already been federally inspected and licensed, was upheld.

Given the degree to which the States today are commercially interconnected, almost any legislation under the State's police power may affect interstate commerce to some extent. This Court considered that very point in the *Huron* case, *supra*, 362 U.S. at 443-44:

> "In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the constitution when 'conferring upon Congress the regulation of commerce, . . . never intended to cut the States off from legislation on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great

> variety of ways, may affect commerce and the meaning of the Constitution.' *Sherlock* v. *Alling*, 93 U.S. 99, 103.''

See, also, *Terminal Railroad Association of St. Louis* v. *Brotherhood of Railroad Trainmen*, 318 U.S. 1, 6, where this Court stated:

> ''State laws have long regulated a great variety of conditions in transportation and industry, safety devices and protections, purity of water supply, fire protection, and innumerable others. • • • [W]e would hardly be expected to hold that the price of the federal effort to protect the peace and continuity of commerce has been to strike down state sanitary codes, health regulations, factory inspections, safety provisions for industry and transportation.''

Another area where this Court has consistently upheld State legislation against claims of undue interference with interstate commerce is in the field of railroad ''full crew'' laws. These statutes, which vary to some extent among those States which have enacted them, prescribe certain minimum crew sizes for specified railroad activities, and even though they frequently necessitate the ''halting of a train at the State line'' to add or subtract crew members, they have been held valid enactments under the police power doctrine. See *Brotherhood of Locomotive Firemen and Enginemen et al.* v. *Chicago, R.I. & P.R.R. Co. et al.*, 393 U.S. 129; *Missouri Pacific R. Co.* v. *Norwood*, 283 U.S. 249; *St. Louis & Iron Mountain Ry.* v. *Arkansas*, 240 U.S. 518; and *Chicago, R.I. & P.R.R. Co.* v. *Arkansas*, 219 U.S. 453. See, also, *New York Central R.R. Co.* v. *Lefkowitz*, 241 N.E. 2d 730, 23 N.Y. 2d 1 (1968).

In *A. E. Nettleton Co.* v. *Diamond*, 264 N.E. 2d 118, *supra*, and *Palladio, Inc.* v. *Diamond*, 321 F. Supp. 630, *supra*, the Courts considered the effect on interstate commerce of § 358-a of New York's Agriculture & Markets Law.

This statute prohibits the sale or offer for sale in New York of products made from the skins of certain animals, including animals which may lawfully be imported into the United States under the Federal Endangered Species Act (16 U.S.C. §§ 668aa *et seq.*) and which may lawfully be sold or offered for sale in other States. Yet, despite the obvious burden this statute places on interstate commerce, the Courts upheld it and found that whatever burden it does impose, it is not an *undue* or *unconstitutional* one.

Act 167 of the Michigan Public Acts of 1970 clearly does not place an unconstitutional burden on interstate commerce, nor does it interfere with the Federal government's general supervisory powers over maritime matters.

Appellants are in effect asking this Court to "sit as a 'superlegislature to weigh the wisdom of legislation'"—an anachronistic role which the judiciary has long refused to play in the area of protection of the public health and environment. *Ferguson* v. *Skrupa,* 372 U.S. 726, 731.

C.

Appellants' remaining objections to the Michigan Act are equally insubstantial. The claim that the language of Sec. 3(1) thereof is unconstitutionally vague is without merit. That section prohibits the discharge into Michigan waters of materials "which render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes." That terminology, identical to the wording of New York's § 33-c2(a) (p. 2a), does not require "men of common intelligence [to] guess at its meaning." *Lanzetti* v. *New Jersey,* 306 U.S. 451, 453. See *Joseph E. Seagram & Sons, Inc.* v. *Hostetter,* 384 U.S. 35, 48-50, reh. den. 384 U.S. 967; *Rowan* v. *United States Post Office Dept.,* 397 U.S. 728, 740. The words "unsightly, noxious and unwholesome", used in the context of a statute dealing with pollution of waters from

discharges from toilets on watercraft, are eminently clear to men of common intelligence as to the health hazard sought to be corrected or prevented. Indeed, a California Court has specifically ruled that the word "noxious" is not unconstitutionally vague. *People* v. *Plywood Manufacturers of California*, 291 P. 2d 587, 591, 137 Cal. App. 2d 859 (1955).

The argument that the statute discriminates against appellants is preposterous. It very clearly applies to *all* watercraft, both commercial and recreational, and thus does not exempt from its provisions any particular class of watercraft. Michigan has acted well within its ample police power in placing restrictions on waterborne polluters as a class, just as it has already placed restrictions on shore-based polluters as a class.

CONCLUSION

The decision of the District Court should be affirmed, and Act 167 of the Michigan Public Acts of 1970 should be declared to be constitutional in all respects.

Dated: New York, New York, February 18, 1972.

Respectfully submitted,

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APPENDIX

§ 33-c. Regulating disposal of sewage; littering of waterways

1. As used in this section, unless the context clearly indicates otherwise:

(a) The term "watercraft" means any contrivance used or capable of being used for navigation upon water whether or not capable of self-propulsion, except passenger or cargo-carrying vessels subject to the Quarantine Regulations of the United States Public Health Service adopted pursuant to Title forty-two of the United States Code.

(b) The term "marina" means any installation which provides any accommodations or facilities for watercraft, including mooring, docking, storing, leasing, sale, or servicing of watercraft, located adjacent to waters of the state.

(c) The term "sewage" means all human body wastes.

(d) The term "litter" means any bottles, glass, crockery, cans, scrap metal, junk, paper, garbage, rubbish, trash, or similar refuse.

(e) The term "marine toilet" means any toilet on or within any watercraft, except those that have been permanently sealed and made inoperative.

(f) The term "waters of this state" means all of the waterways, or bodies of water located within New York state or that part of any body of water which is adjacent to New York state over which the state has territorial jurisdictions on which watercraft may be used or operated.

(g) The term "person" means an individual, partnership, firm, corporation, association, or other entity.

(h) The term "department" means the state conservation department, except as otherwise provided in this section.

2. (a) No person, whether engaged in commerce or otherwise, shall place, throw, deposit, or discharge, or cause to be placed, thrown, deposited, or discharged into the waters of this state, from any watercraft, marina or mooring, any sewage, or other liquid or solid materials which render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes.

(b) No person, whether engaged in commerce or otherwise, shall place, throw, deposit or discharge, or cause to be placed, thrown, deposited, or discharged into the waters of this state, any litter from any watercraft, marina or mooring.

3. (a) No marine toilet on any watercraft used or operated upon waters of this state shall be operated so as to discharge any untreated sewage into said waters directly or indirectly.

(b) No person owning or operating a watercraft with a marine toilet shall use, or permit the use of, such toilet on the waters of this state unless the toilet is equipped with facilities that will adequately treat, hold, incinerate or otherwise handle sewage in a manner that is capable of preventing water pollution, as required by this section.

(c) Except as provided in subdivisions four and seven of this section, no container of sewage shall be placed, left, discharged or caused to be placed, left or discharged in or bordering any waters of this state by any person at any time.

4. (a) Every marine toilet on watercraft used or operated upon the waters of this state shall be equipped with a pollution control device, either for the treatment or holding of sewage, in operating condition, of a type approved by the state health department, in conformance with appli-

cable public health standards and rules and regulations; and approved by the department in conformance with the boating safety standards and rules and regulations adopted by the department. Pollution control devices shall be securely affixed to the interior discharge opening of marine toilets and all sewage passing into or through such toilets shall pass solely through such treatment facilities.

(b) Sewage passing through a marine toilet equipped with a chlorinator or chemical treatment facility shall be deemed untreated unless the effluent meets standards established by the state commissioner of health.

(c) The disinfecting agent used in the facility shall be of a kind which when discharged as a part of the effluent is not toxic to humans, fish or wildlife.

5. No marine toilet pollution control device shall be used, sold or physically offered for sale in this state unless it is of a type which has officially been approved by the department. The department approval shall be issued only after approval of such devices by the state department of health, as required by subdivision four of this section. Notice of such approval may be required by the department to be displayed on the pollution control device.

6. The department shall require persons making application for a boat registration certificate for a watercraft pursuant to section seventy-one of the navigation law to disclose whether such watercraft has within or on it a marine toilet, and if so, to certify that such toilet is equipped with a pollution control device as required by this section. The department is further empowered to direct that the issuance of a boat registration certificate or a renewal thereof be withheld if such device had not been installed as provided in this section.

7. The owner or whoever is lawfully vested with the possession, management or control of a marina shall be

required to provide suitable trash receptacles or similar devices designed for the depositing of litter at locations where they can be conveniently utilized by watercraft users.

8. All marinas that provide for the handling and disposal of sewage from holding tanks of watercraft shall do so in a manner that will prevent the pollution of the waters of the state. The facilities for unloading and disposal of such sewage shall be approved by either the local or the state health department in accordance with section twelve hundred thirty of the public health law.

9. All watercraft located upon waters of this state shall be subject to boarding and inspection by the department or health department or any lawfully designated agents or inspectors thereof, for the purpose of determining whether such watercraft is equipped with approved marina toilet pollution control facilities operated in compliance herewith.

10. By the enactment of this section, the state fully exercises the exclusive right to establish requirements with reference to the disposal of sewage from watercraft. In order to insure state wide uniformity, the regulation by any political subdivision of the state of sewage disposal from watercraft is prohibited on and after March first, nineteen hundred seventy.

11. The department is hereby authorized and empowered to make, adopt, promulgate, amend and repeal such standards and rules and regulations as are necessary, or convenient for the carrying out of duties and obligations and powers conferred on the department by this section.

12. A copy of the regulations adopted pursuant to this section and any of the amendments thereto, shall be filed in the office of the department, the health department, the water resources commission, and in the office of the secre-

tary of state. Rules and regulations and standards shall be published by the department in convenient form.

13. (a) Any person who violates paragraph (b) of subdivision two of this section, shall be guilty of an offense and upon conviction shall be punished with a fine of not more than one hundred dollars, or by imprisonment of not more than sixty days, or by both such fine and imprisonment; provided, however, that in the event any person violates this section more than twice during the same calendar year and is convicted of more than two such violations, the third and each subsequent violation shall be deemed a misdemeanor.

(b) Any person who violates any other provision of this section or regulations of the department adopted pursuant hereto shall be deemed guilty of a misdemeanor and upon conviction shall be punished with a fine of not more than one hundred dollars, or by imprisonment of not more than sixty days, or by both such fine and imprisonment.

14. Any action taken by the department or the state department of health pursuant to subdivisions five or six of this section shall be subject to review by the supreme court in the manner provided by article seventy-eight of the civil practice law and rules provided that no stay shall be granted pending the determination of the matter except on notice to the department and the state department of health and for a period not exceeding thirty days.

Proceedings to review any action enumerated herein shall be entitled to a preference.

15. If any court shall find any subdivision or subdivisions of this section to be unconstitutional or otherwise invalid, such findings shall not affect the validity of any sections of this act which can be given effect.

16. Nothing in this section, shall be deemed to repeal, amend, modify or alter the provisions of article twelve of

the public health law or the provisions of sections thirty-three-a and thirty-three-b of the navigation law. Added L.1966, c. 897, § 2; amended L.1967, c. 540, §§ 1, 2; L.1968, c. 1036, § 1; L.1969, c. 16, § 1; L.1970, c. 785, eff. 30th day after May 12, 1970.

Subd. 4 amended L.1967, c. 540, § 1, eff. April 24, 1967. L.1967 inserted "established by the state commissioner of health" and omitted the enumerated minimum standards of the effluent.

Subd. 8 amended L.1967, c. 540, § 2, eff. April 24, 1967; L.1970, c. 785, eff. 30th day after May 12, 1970. L.1967 substituted "marinas that" for "marinas shall" and inserted "shall do so". L.1970 added sentence beginning "The facilities".

Subd. 10 amended L.1968, c. 1036, § 1, eff. June 22, 1968; L.1969, c. 16, § 1, eff. March 4, 1969. L.1968 substituted March 1, 1969 in lieu of June 1, 1968. L. 1969 substituted "seventy" for "sixty-nine".

Legislative declaration. Section 1 of L.1966, c. 897, provided: "The protection of the safety, health, cleanliness and usefulness of the waters of the state requires that operation of watercraft, and marinas serving such vessels, be regulated in the interest of public health and public enjoyment."

Effective date of L.1966, c. 897. Section 3 of L.1966, c. 897, as amended L.1968, c. 1036, § 2; L.1969, c. 16, § 2, provided: "The provisions of this act with reference to requiring watercraft with toilet facilities to be equipped with pollution control devices, and prohibiting the placing, throwing, depositing or discharging of any untreated sewage from any watercraft into the waters of the state, shall take effect March first, nineteen-hundred seventy; provided, however, that until such effective date the provisions of any local law or ordinance requiring or regulating the installation of such devices, or prohibiting the placing, throwing, depositing or discharging of any untreated sew-

age from any watercraft into the waters of the state, shall remain in full force and effect. All other provisions of this act shall take effect August first, nineteen hundred sixty-six."

1. Waters within section

This section applies to the waters of Nassau and Suffolk counties as well as the other counties of the state and police officers of such counties, assigned to the duty of enforcement of sections 79-a, 79-b and 79-c, are, if designated by the office of parks and recreation, agents of that office for the purpose of determining compliance with this section. 1971, Op.Atty.Gen. Mar. 29.

Opinion, United States District Court Western District of New York.

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Plaintiffs on July 13, 1971 filed an amended complaint asking for a declaratory judgment and injunctive relief. They ask this court to convene a three judge court pursuant to Section 2284 of Title 28, U.S.C., that Section 33-C of the Navigation Law of New York and the regulation promulgated, as applied to plaintiffs' watercraft, be declared unconstitutional in whole or in part, that the court enjoin temporarily and permanently the defendants, collectively and individually, from enforcing the provisions of Section 33-C of the Navigation Law, and particularly the criminal provisions thereof, and an injunction pending this suit.

This court fixed a date for a hearing on plaintiffs' application for a preliminary injunction.

The defendants by notice of motion dated August 18, 1971 moved to dismiss the complaint on specific grounds stated, among which are that this court lacks jurisdiction over the subject matter; that the action is premature, and that this court should abstain from taking jurisdiction under the doctrine of equitable abstention. The motions

came on for a hearing and oral argument. The respective parties have filed written memoranda.

Findings of Fact

1. Section 33-c of the New York Navigation Law was enacted by the New York State Legislature in 1966 (Laws of 1966, Chapter 897). It prohibits the placing, throwing, deposit or discharge into the waters of New York State, from any watercraft, marine or mooring, of any "sewage or other liquid or solid materials which render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes." It prohibits the use of marine toilets on watercraft on the water of New York State "unless the toilet is equipped with facilities that will adequately treat, hold, incinerate or otherwise handle sewage in a manner that is capable of preventing water pollution, as required by this section." This provision went into effect March 1, 1970. The plaintiff contends that the statute is unconstitutional on the grounds that it conflicts with certain provisions of the Federal Water Quality Improvement Act and Water Pollution Control Act, creates an unconstitutional burden on interstate commerce, and is unconstitutionally vague and discriminatory.

2. This court declines to convene a three judge court as demanded in the complaint.

3. The plaintiffs do not sue for money damages, but only for a declaratory judgment and injunctive relief. They assert that this is a case involving also the admiralty and maritime jurisdiction of this court. Admiralty cannot give injunctive relief, Khedivial Line vs. Seafarers' Int. Union, 278 F. 2d. 49 (2 Cir. 1960); nor can it issue a declaratory judgment. This is not a case involving admiralty or maritime jurisdiction nor have the plaintiffs alleged any

other valid basis for jurisdiction of this court. This court lacks jurisdiction over the subject matter of the suit.

4. The Federal Water Pollution Control Act, 33 U.S.C. Section 1151 et seq, does not evidence congressional intent to preempt this field or to exclude state action at this time.

5. There is no merit to the argument of the plaintiffs that the state is powerless to act to protect the health and welfare of its residents during the period prior to the effectiveness of federal standards.

6. There is no merit to the claim of the plaintiffs that the statute constitutes an unconstitutional burden on interstate commerce.

7. There is no merit to plaintiffs' claim that Section 33-C could result in the impairment of contractual rights.

8. There is no merit to plaintiffs' claim that the provisions of Section 33-C permitting boarding and inspection of watercraft by state agents without a prior warrant constitutes a violation of the Fourth Amendment prohibition against warrantless searches. Moreover, none of the plaintiffs has been made the victim of an allegedly unconstitutional search nor has such a search been threatened, nor has the statute been enforced against any of them. When and if any plaintiff is prosecuted for violation of Section 33-C, and if that prosecution resulted from a search of its vessel without a warrant, it will then have an opportunity to raise its Fourth Amendment claims, if applicable, as a defense in a criminal prosecution.

9. Section 33-C fully complies with the constitutional requirements of due process and equal protection under the Fourteenth Amendment. Neither the complaint nor the amended complaint raises any substantial federal question.

10. Even if this court did have jurisdiction, it should abstain from exercising such jurisdiction in the circumstances of this case. Reetz vs. Bozanich, 397 U.S. 82; Zwickler vs. Koota, 389 U.S. 241. No state court has ever had an opportunity to interpret and construe the statute and procedures under attack here.

CONCLUSION OF LAW

1. Plaintiffs' motion for a preliminary injunction is denied. IT IS HEREBY SO ORDERED.

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the complaint and the amended complaint herein are dismissed.

HAROLD P. BURKE
HAROLD P. BURKE
United States District Judge

January 12, 1972.

In the Supreme Court of the United States

Supreme Court, U. S
FILED
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MICHAEL RODAK, JR., C

OCTOBER TERM, 1971.

No. 71-422.

LAKE CARRIERS' ASSOCIATION, *et al.*,

Appellants,

vs.

RALPH A. MacMULLAN, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION.

REPLY BRIEF ON BEHALF OF APPELLANTS.

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In the Supreme Court of the United States

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LAKE CARRIERS' ASSOCIATION, *et al.*,
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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION.

REPLY BRIEF ON BEHALF OF APPELLANTS.

Once again this Court is faced with the illusive question of the scope of the judicial function in respect of resolving limits of "national-state" power. Not a novel question certainly, but nevertheless one appellants feel deserving of further analysis and consideration.

I. FEDERAL COURTS AND PROCEDURE—ABSTENTION.

The doctrine of abstention would appear to be bottomed on the theory of avoiding unnecessary adjudications of doubtful constitutional questions which ultimately might be supplanted by a controlling decision of a state court. But it is no more attractive an alternative to have ambiguous and obscure adjudications by state courts standing as barriers to the determination by this Court of the validity under the Federal Constitution of state action.

In *Zwickler v. Koota*, 389 U.S. 241, this Court, quoting from *Stapleton v. Mitchell*, 60 F. Supp. 51, 55, said, at page 248:

> "We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum."

The "special circumstances" required to invoke the doctrine of abstention are not present here. There is no reason to abstain while the parties repair to a state court to determine whether or not Michigan has the legal authority to compel the installation of holding tanks or incinerating devices on federally licensed vessels. No interpretation of the Michigan statute by a state court can avoid or circumvent this issue which ultimately must be resolved on the basis of the Federal Constitution irrespective of the forum invoked.

This Court has frequently held that in the exercise of its appellate jurisdiction it has the power not only to correct errors of law in the judgment under review, but also to make such disposition of the case as justice requires. Appellants believe that, in the interest of justice, this Court is duty bound to now decide the issues joined on the pleadings and the evidence.

Michigan asserts that a challenge on the Federal level to the validity of its statute should not be entertained because no irreparable injury has been shown from harassment through the prosecution of criminal proceedings, and that Michigan officials have merely sought the voluntary cooperation of the vessel companies. Aside from the fact that the lack of harassment through criminal proceedings and the seeking of voluntary cooperation can in no way

lend any constitutional validity to the Michigan statute, harassment or the lack of harassment simply is not and should not be the sole test. Appellants do not believe that the "special circumstances" necessary to justify abstention should be deemed to be present simply because harassment through criminal prosecutions has not occurred. The burden of "special circumstances" is upon those who seek abstention, not those who oppose it.

This Court, in *Zwickler v. Koota, supra,* points out that recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law. Said this Court, page 252:

> "These principles have particular significance when, as in this case, the attack upon the statute on its face is for repugnancy to the First Amendment. In such case to force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect. * * *"

While this Court, in *Zwickler v. Koota, supra,* was concerned with first amendment rights, which certainly are of extreme importance, appellants contend that other rights, secured by the Constitution, are of equal importance.

That a "chilling" effect can be achieved other than by harassment through the prosecution of criminal proceedings is abundantly clear. Attached hereto (Appendix A) are two television editorials which appeared on WJBK-TV2 Detroit during August last year. The implication in such editorials that appellants are not law-abiding citizens and that they can be brought into conformity with law only through the force of public opinion is about as "chilling"

a type of pressure as can be brought to bear. Because of such "chilling" effect from public pressure within Michigan, a delay in the final determination of this litigation could well result in defeating the very purposes for which appellants assert their federal claims.

II. THE NATIONAL POWER AS A LIMITATION UPON STATE POWER.

It is recognized, as asserted by Amicus Curiae New York, that the police power of the state is the least limitable of all the powers of government, but even that statement implies that there is, at least, some limitation.

Gibbons v. Ogden, 9 Wheat. 1, establishes that the states may regulate their own purely "internal affairs" whether of trading or police, unless such regulations come into collision with an Act of Congress and deprive a citizen of a right to which that Act entitles him. In the *License Cases*, 5 How. 504, Chief Justice Taney acknowledged that the states may, for the safety or convenience of trade or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors and for its own territory.

But the police power is essentially a "local" power and, while there has been left to the states a wide scope for the regulation of matters of "local" state concern, the states have not been deemed to have authority to regulate those phases of the national commerce which, because of the need of national uniformity, demand that the regulation, if any, be prescribed by a single authority. *Cooley v. Port Wardens of Philadelphia*, 12 How. 299.

The evil here is that the Michigan statute reaches far beyond Michigan's jurisdiction. Once a vessel installs holding tanks or an incinerating device it must utilize that

equipment wherever it may go. The practical effect of such a regulation is to control vessel operations beyond the boundaries of the state, indeed throughout the entire Great Lakes.

Michigan asserts that it makes no difference what other states or the federal regulations may provide, for if the vessel operators comply with the Michigan requirement of total retention they will be in compliance with the regulations of all of the other states as well as with any forthcoming regulations of the EPA. At first blush such a simple argument would seem to have some appeal, but under the Federal Constitution it will not bear analysis, as found by this Court in *Southern Pacific Co. v. Arizona*, 325 U.S. 761.

It seems that Arizona attempted to make it unlawful to operate within the state a railroad train of more than 14 passenger or 70 freight cars. This Court noted that such a statute required interstate trains of a length lawful in other states to be broken up and reconstituted as they enter each state according as it may impose various limitations on train lengths. The alternative was for the carrier to conform to the lowest train limit restriction of any of the states through which its trains passed. Because it was not feasible to operate a newly assembled train from the New Mexico yard nearest to Arizona, the Arizona limitation governed the flow of traffic as far east as El Paso, Texas. Said the Court, page 775:

> "If one state may regulate train lengths, so may all the others, and they need not prescribe the same maximum limitation. *The practical effect of such regulation is to control train operations beyond the boundaries of the state* exacting it because of the necessity of breaking up and reassembling long trains at the nearest terminal points before entering and after leaving the regulating state. The serious im-

> pediment to the free flow of commerce by the local regulation of train lengths and the practical necessity that such regulation, if any, must be prescribed by a single body having a nation-wide authority are apparent." (Emphasis supplied.)

Here, Michigan seeks to regulate the equipment of commercial Great Lakes vessels from the head of the lakes to Anticosti Island. The extraterritorial effect of the Michigan statute is thus much greater than that even of the train limit law which was struck down in *Southern Pacific Co. v. Arizona, supra.* Further said this Court in that case, pages 779-780:

> "The principle that, without controlling Congressional action, a state may not regulate interstate commerce so as substantially to affect its flow or deprive it of needed uniformity in its regulation is not to be avoided by 'simply invoking the convenient apologetics of the police power,' * * *"

This Court, in *Southern Pacific Co. v. Arizona, supra,* also distinguished the series of full train crew cases upon which Michigan and New York rely. Said the Court, page 782:

> "* * * While the full train crew laws undoubtedly placed an added financial burden on the railroads in order to serve a local interest, they did not obstruct interstate transportation or seriously impede it. They had no effects outside the state beyond those of picking up and setting down the extra employees at the state boundaries; they involved no wasted use of facilities or serious impairment of transportation efficiency, which are among the factors of controlling weight here. * * *"

In seeking to compel the installation of holding tanks or incinerating devices, the Michigan statute has wide spread effects outside the state. It means that pump out

facilities must be installed in virtually every Great Lakes port, even though neither federal law nor the state law governing a particular port may so require. Michigan, in essence, is trying to commit the entire Great Lakes region to its system of pollution control by simply invoking the convenient apologetics of the police power.

Michigan contends that appellants have suffered no damage and have shown no irreparable injury, because most of the carriers use their own piers for loading and unloading. This simply is not true. If the Court will examine Exhibits 8, 9 and 10, which are charts of the St. Marys, St. Clair and Detroit Rivers, it will be seen that there are numerous docks unconnected in any way with the parties to this litigation.

Irreparable injury arises because appellants are without an adequate remedy at law or in equity to compel the installation of pump out facilities in any of the ports outside of Michigan. The only alternatives are to pump out in the open lake outside of Michigan or, if Michigan does install pump out facilities, to bring it all back to Michigan shoreside communities. In that event Michigan will become the sewage collector of the Great Lakes.

In the final analysis, however, the decisive question would seem to be whether the total effect of the Michigan law as a "local" state health measure outweighs the national interest in keeping interstate and maritime commerce free from interferences which seriously impede it and subject it to local regulation which does not have a uniform effect on such commerce. The Michigan statute in no way meets this test.

Michigan stresses (Appellees' brief, page 28), that since a vessel does not have a fixed location, a discharge of sewage from a vessel could, in fact, be right over a municipal water intake. This completely ignores the pro-

visions of the Interstate Quarantine Regulations promulgated by the United States Public Health Service pursuant to Title 42 of the United States Code.

42 U.S.C. § 264 provides in part:

> "(a) The Surgeon General, with the approval of the Secretary, is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. * * *"

Pursuant to this authority the Interstate Quarantine Regulations (42 C.F.R. § 72) have been promulgated by the Surgeon General. Such regulations are applicable to all cargo vessels engaged in interstate traffic. (42 C.F.R. § 72.1(i)). The definition of vessels subject to such regulations covers all of appellants' vessels (42 C.F.R. § 72.1(o)).

42 C.F.R. § 72.121 provides with respect to the discharge of wastes:

> "Vessels operating on fresh water lakes or rivers shall not discharge sewage, or ballast or bilge water, within such areas adjacent to domestic water intakes as are designated by the Surgeon General.
>
> "Cross Reference: For designation of areas by the Surgeon General of the Public Health Service pursuant to § 72.121, see 25 F.R. 8925, Sept. 16, 1960."

25 F.R. 8925 (reproduced and attached hereto as Appendix B) lists the precise location of every domestic water intake on the Great Lakes and prohibits vessels subject to the Interstate Quarantine Regulations from discharging sewage, ballast or bilge water within three miles of any such domestic water intake. Thus, Federal law has already resolved the problem which Michigan

foresees with respect to vessels discharging near domestic water intakes and, in fact, it would seem that the necessity for the Michigan statute to protect domestic water supplies is de minimus. Such, moreover, is not an assumption or simply an argument, but a proven fact on the record. Michigan, both in its testimony (A. 119) and in its brief (page 28), emphasizes that the state constantly checks the quality of the water near any water intake. Accordingly if vessels were polluting the waters in the vicinity of domestic water intakes, then certainly the state, through its constant checks, would have the necessary evidence. Yet nowhere in the record has Michigan established or come forward with any evidence that any ship has damaged water quality affecting domestic water supplies.

The Interstate Quarantine Regulations remove yet another cloud that has been cast upon this litigation by the Amicus Curiae brief of the State of New York. It argues vigorously that it has a law similar to Michigan predicated upon the local police power. Interestingly enough, however, New York excludes from the definition of "watercraft", subject to its Act, passenger or cargo carrying vessels subject to the Quarantine Regulations of the United States Public Health Service adopted pursuant to Title 42 of the United States Code. (New York Laws 1966, Chapter 897; Brief of the State of New York, Appendix page 1a.) Since all of appellants' vessels are subject to the Interstate Quarantine Regulations it follows that they are specifically excluded from the New York Act. Thus the New York Act is not at all similar in scope or effect to the Michigan Act. Neither is the legislation of Wisconsin nor the regulations of the St. Lawrence Seaway similar to Michigan's statute as is tacitly asserted by Michigan in its brief (page 31).

Wis. Stat. Ann. § 29.01(4) provides for the following classification of Wisconsin waters:

> "(4) Waters classified. All waters within the jurisdiction of the state are classified as follows: Lakes Superior and Michigan, Green Bay, Sturgeon Bay, Sawyer's harbor, and the Fox river from its mouth up to the dam at De Pere are 'outlining waters.' All other waters, including the bays, bayous and sloughs of the Mississippi river bottoms, are 'inland waters.'"

Wis. Stat. Ann. § 30.71(2) provides:

> "(2) No person shall operate any boat equipped with toilets on any outlying waters of this state, as defined in s. 29.01(4), unless the toilet wastes are retained for shore disposal by means of facilities constructed and operated in accordance with rules adopted by the department of health and social services: *This subsection shall not apply to boats engaged in international or interstate commerce.*" (Emphasis supplied.)

Consequently, Wisconsin law does not apply to the vessels of appellants because they are engaged in interstate and foreign commerce on outlying waters.

Ohio Revised Code Section 1547.331 provides:

> "No person shall launch, moor, dock, use, or operate on Lake Erie, the Muskingum river, or the Ohio river, or their immediately connected harbors and anchorage facilities, on or after July 1, 1973, any watercraft which contains a toilet which is capable of discharging sewage into such waters, unless the watercraft is equipped with a sewage disposal system which is approved by regulation of the department of health as providing treatment or disposal of effluent in a manner which is adequate to protect the public health which complies with water quality standards adopted by the water pollution control board, and which meets standards for safety estab-

> lished by regulation of the chief of the division of watercraft, and is maintained and used."

Thus, when Ohio's law becomes effective the overboard discharge of treated effluent will be accepted, which is far different from the Michigan statute. Pennsylvania appears to have no statutory provisions whatsoever and presumably the Federal standards when promulgated will be accepted.

Concerning the St. Lawrence Seaway, 33 C.F.R. § 401.102-19 provides with respect to sewage and garbage disposal systems:

> "Vessels not otherwise equipped with containers for ordures shall be equipped with a sewage disposal system enabling compliance with applicable laws relative to sewage disposal. * * *"

As previously indicated, the statutory provisions of New York are not applicable to appellants' vessels on United States waters of the St. Lawrence Seaway (although they are also New York waters) because New York law specifically exempts vessels subject to the Interstate Quarantine Regulations. Thus the only statutory enactment applicable to United States waters of the St. Lawrence Seaway is the Federal Water Pollution Control Act, as amended by the Water Quality Improvement Act of 1970, 33 U.S.C. § 1151 et seq. Accordingly, the implication of Michigan's brief (page 31), that most of the so-called Great Lakes states and the St. Lawrence Seaway, having taken some form of action regarding the discharge of sewage, necessarily leads to uniformity, is purely an illusion.

Michigan, in its brief (page 30) places great stress on the notice of the Administrator of the Environmental Protection Agency, issued May 12, 1971, to the effect that

until the Federal standards become effective "the States have the autority to adopt and enforce their own statutes and regulations on this subject without federal participation." What the Administrator neglected to add is that in so exercising such authority the states cannot exceed the scope of their "local" police powers, nor unduly burden interstate commerce or interfere with the proper harmony of the maritime law, which Michigan, in this instance, has clearly done. The pronouncement in 33 U.S.C. § 1151 that nothing in the Federal Act shall be construed as impairing or in any manner affecting any right or jurisdiction of the states in no way confers additional power over and above the "local" police power on the states. *Cooley v. Port Wardens of Philadelphia, supra,* clearly establishes that, while Congress may adopt the laws of a state, it cannot enable a state to legislate. In substance, Congress cannot transfer to a state its legislative powers. *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149; *American Waterways Operators, Inc., et al. v. Askew, et al.,* No. 71-156-Civ-J (M.D. Fa., December 10, 1971). Any void that may have been left by Congress (a proposition appellants do not admit) in planning and implementing an orderly, realistic, uniform scheme of vessel pollution control does not automatically mean that the states can move into that void. Further, 33 U.S.C. § 1154 clearly indicates that the type of state activity contemplated by the Congress was not individual state action but the promulgation of uniform state laws relating to the prevention and control of water pollution through the medium of interstate compacts approved by the Congress.

Finally, it remains but to dispose of the argument advanced by Michigan that, in any event, under 33 U.S.C. § 1163(f) a state may make application to the Administrator of the Environmental Protection Agency for a pro-

hibition against the discharge from a vessel of any sewage (whether treated or not) into the waters of such state. Concerning this particular provision of law, the Report of the Committee on Public Works, United States Senate, accompanying S. 7, the companion bill of H.R. 4418, which ultimately became the Water Quality Improvement Act of 1970 (91st Congress, First Session, Report 91-351), states, pages 12-13:

> "The committee is aware, however, of the necessity to relate any sewage treatment control measure to existing water quality programs. Consistent with this philosophy, the committee has provided authority for the States to prohibit entirely the discharge of any sewage from vessels without regard to the regulations regarding installation of marine sanitation devices if a water quality standards plan for implementation requires such restrictive measures. *This exception is not intended to be broadly construed.* A State cannot prohibit vessel waste discharges for all of its rivers, and lakes and coastal waters unless the State has in fact adopted standards which establish uses for all of those waters which require such an absolute prohibition. *In effect, the committee intends that any State prohibition apply only to areas designated for protection of public drinking water supplies, shellfish beds, and areas designated for body contact recreation.*" (Emphasis supplied.)

Consequently there is no basis in law for Michigan's assertion that even under the Federal Act the entire territorial waters of Michigan may be made a no discharge area and that therefore it may require holding tanks or incinerating devices.

CONCLUSION.

All things considered, appellants can put forth no more concise statement of their position than that of Mr. Justice Miller in *Henderson v. Mayor of New York*, 92 U.S. 259. Said Mr. Justice Miller, page 274, writing for the Court:

> "We are of the opinion that this whole subject has been confided to Congress by the Constitution; that Congress can more appropriately and with more acceptance exercise it than any other body known to our law, state or national; that by providing a system of laws in these matters, applicable to all ports and to all vessels, a serious question, which has long been matter of contest and complaint, may be effectually and satisfactorily settled."

Respectfully submitted,

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WJBK-TV2 DETROIT

EDITORIAL

ROBERT C. WHITE
EDITORIAL DIRECTOR

Monday, August 16, 1971

FREIGHTERS FOUL THE GREAT LAKES

CAMERA:
McBRIDE

FILM:
SHIPS

Since 1970, Michigan has prohibited the discharge of raw sewage from any vessel using state waterways. While the vast majority of small pleasure boat operators have installed holding tanks or other approved retention systems, nine of every ten Great Lakes commercial ships continue to pollute with impunity.

Notable exceptions are the Ford Motor Company fleet and most foreign vessels. But a nearly total lack of cooperation has come from the powerful Lake Carriers Association, which argued in Federal District Court that Michigan has no jurisdiction over interstate commerce.

A panel of judges ruled that the state does indeed have the power to police its waters, but restrained action against the carriers pending a time-consuming appeal to the U.S. Supreme Court.

In the meantime, according to the State Water Resources Commission fully 90 percent of the domestic freighters plying Michigan waters continue to foul them with untreated human waste. The Commission is powerless to do much but gently prod the shippers and offer any desired assistance.

CAMERA:
McBRIDE

CARD: ADDRESS

CAMERA:
McBRIDE

It's just possible that the force of public opinion, especially from law-abiding small boat operators, might help convince the shippers of their responsibility in the pollution fight. TV2 hopes you'll let your feelings be known to the Lake Carriers Association, Rockefeller Building, Cleveland, Ohio. We also hope the problem will receive the careful attention of the international conference on Great Lakes pollution now in progress on Mackinac Island.

Delivered by: Robert J. McBride, Director of News & Community Affairs.

APPENDIX A (Page 1)

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WJBK-TV2 DETROIT

EDITORIAL

ROBERT C. WHITE
EDITORIAL DIRECTOR

Wednesday, August 25, 1971

THE CARRIERS VS. THE COMMISSION

CAMERA: McBRIDE

TV2 recently noted that, while Michigan law requires sewage holding tanks on all watercraft passing through state waters, nine out of ten Great Lakes freighters are ignoring that law.

CHROMA KEY: LETTER

We're now in receipt of a letter from the Lake Carriers Association in Cleveland disputing TV2's assertion that "the vast majority" of Michigan pleasure boat owners have installed holding tanks. The Michigan Water Resources Commission, to the contrary, states flatly that 93 percent have.

FILM: SHIPS

The Carriers Association letter also declares that fully 25 percent of the commercial vessels in the Great Lakes fleet do have "installations for the treatment of sewage." The Water Resources Commission tells us, however, that nearly all of these are of the so-called "macerator-chlorinator" type which merely fragment and to some degree disinfect waste -- a procedure unacceptable under Michigan law.

The Carriers Association correctly points out that most Michigan ports have only "primary" sewage treatment plants and adds that pumping shipboard waste into them actually would increase pollution. Disagreeing, the Water Resources Commission says that even primary municipal sewage treatment, involving sedimentation, is far superior to any existing shipboard disposal system.

CAMERA: McBRIDE

While it's true that freighters account for only a small percentage of our total pollution problem, they are mobile polluters discharging waste indiscriminately. TV2 continues to believe that they should obey Michigan law and install holding tanks.

Delivered by: Robert J. McBride, Director of News & Community Affairs

APPENDIX A (Page 2)

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DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Public Health Service

INTERSTATE QUARANTINE

Discharge of Vessel Wastes in Fresh Water Rivers and Lakes—the Great Lakes and Connecting Waters

Notice is hereby given that pursuant to § 72.121 of the Interstate Quarantine Regulations of the Public Health Service (42 CFR 72.121) the Surgeon General of the Public Health Service has designated the areas described herein adjacent to the below listed domestic water intakes in the Great Lakes and connecting waters as restricted areas within which the discharge of sewage, or ballast or bilge water from vessels is prohibited.

Except as otherwise specifically indicated, in each case the restricted area includes the water within a circle having a radius of three miles with the domestic water intake as its center, in no event, however, extending beyond the international boundary line with Canada.

This restriction applies to all vessels which are under way, moored or anchored within the restricted areas subject to the following provisions:

1. Vessels moored at docks shall not discharge sewage, ballast or bilge water overboard if dock facilities for the disposal of such waste are available.

2. Vessels required to anchor within a restricted area under an emergency condition for the safety of the vessel are exempted.

3. Vessels which provide sewage or waste treatment approved by the Surgeon General are exempted from that portion of the restriction applicable to sewage.

These designations will become effective on October 1, 1960.

The list of intakes and the extent of the restricted areas may be revised from time to time by the Surgeon General. Copies of this designation and revisions, if any, may be obtained from the following sources:

Surgeon General, Public Health Service, Department of Health, Education, and Welfare, Washington 25, D.C.

Regional Medical Director, Public Health Service, Department of Health, Education, and Welfare, Room 712, New Post Office Building, 433 West VanBuren Street, Chicago 7, Ill.

Regional Medical Director, Public Health Service, Department of Health, Education, and Welfare, Room 1200, 42 Broadway, New York 4, N.Y.

Regional Medical Director, Public Health Service, Department of Health, Education, and Welfare, 2305 Federal Office Building, 911 Walnut Street, Kansas City 6, Mo.

Medical Officer in Charge, Foreign Quarantine Station, c/o American Consulate General, 1556 McGregor Street, Montreal 25, Canada.

Dated: August 30, 1960.

[SEAL] L. E. BURNEY,
Surgeon General.

Approved: September 9, 1960.

EDWARD FOSS WILSON,
Acting Secretary of Health, Education, and Welfare.

DOMESTIC WATER INTAKES IN THE GREAT LAKES AND CONNECTING WATERS

Source, State, and consumer served	Intake location by U.S. Lake Survey Chart Number	Intake location by geographical coordinates					
		North Latitude			West Longitude		
		Deg.	Min.	Sec.	Deg.	Min.	Sec.
ST. LAWRENCE RIVER							
New York:							
Reynolds Metals Co.[1]	11	44	89	10	74	46	15
Aluminum Co. of America[1]	11	44	87	10	74	45	15
Ogdensburg[1]	14	44	41	10	75	30	15
Morristown[1]	14, 112	44	38	07	75	38	21
Alexandria Bay[1]	115, 116	44	20	11	75	55	27
Thousand Island State Park[1]	16, 116	44	17	33	76	01	36
Clayton[1]	16, 17, 21, 117	44	14	26	76	05	31
Cape Vincent[1]	18, 21	44	07	44	76	20	32
LAKE ONTARIO							
New York:							
Oswego	22, 228	43	28	40	76	31	29
Wolcott Village	22, 23	43	18	40	76	49	34
Sodus Point Village	234	43	16	36	77	03	44
Sodus Village	23	43	16	36	77	03	46
Williamson Water District	23	43	17	36	77	11	17
Ontario Water District	23	43	16	35	77	17	15
Monroe County Water Authority	23, 236	43	17	35	77	37	57
Rochester	23	43	17	30	77	37	57
Hilton	24	43	20	30	77	47	30
Brockport	24	43	21	35	77	55	30
Lyndonville	24	43	22	40	78	23	36
Barker	25	43	22	12	78	33	40
Wilson	25	43	19	12	78	49	49
NIAGARA RIVER							
New York:							
Niagara Falls[1]	31, 312	43	05	05	79	03	12
Lockport[1]	31, 312	43	02	05	78	53	07
North Tonawanda[1]	31, 312	43	01	05	78	53	20
Tonawanda[1]	31, 312	43	01	05	78	53	15
Grand Island[1]	31, 312	43	57	15	78	58	10
Town of Tonawanda[1]	31, 312	43	57	15	78	58	10
LAKE ERIE							
New York:							
Buffalo	31, 312, 314	42	52	07	78	54	45
Erie County Water Authority	31	42	49	45	78	52	55
Wanakah	31	42	44	30	78	50	30
Erie County Water Authority	31, 312	42	41	30	78	52	30
Angola	32	42	38	30	79	02	30
Silver Creek	33	42	33	30	79	10	30
Dunkirk	33	42	29	30	79	20	15
Pennsylvania, Erie (2 intakes)	33, 332	42	07	30	80	05	15
		42	08	45	80	06	10
Ohio:							
Conneaut	33	41	57	45	80	34	30
Union Carbide Metals Co.	34	41	53	30	80	33	45
Ashtabula	34, 342	41	54	30	80	48	30
Lake County	34	41	50	30	81	01	30
Industrial Rayon Co.	34	41	47	15	81	12	30
Diamond Alkali Co.	34, 346	41	46	30	81	15	45
Fairport	34, 346	41	45	45	81	17	30
Painsville	34, 346	41	43	45	81	18	30
Mentor Township Park	34	41	43	30	81	22	30
Cleveland: (a) Nottingham plant	35	41	37	30	81	37	45
(b) Baldwin	35	41	32	45	81	43	30
(c) Division Ave.	35	41	30	30	81	43	30
(d) Clague Rd.	35	41	29	30	81	43	30
Avon Lake	35	41	30	30	82	01	30
Lorain	35, 357	41	27	30	82	11	30
Elyria	35	41	27	30	82	13	15
Vermillion	35, 36	41	26	30	82	22	15
Huron	35, 362	41	24	30	82	32	30
Plum Brook Ordnance Works	36	41	25	30	82	42	30
Sandusky	36, 39, 364, 365	41	27	30	82	42	30
Kelleys Island	36, 39, 364	41	35	30	82	43	45
Put-In-Bay	36, 39, 364	41	38	45	82	48	30
Marblehead	36, 39, 364	41	32	30	82	43	45
Lakeside	36, 39, 364	41	32	30	82	44	30
Port Clinton	36, 37, 39, 364	41	31	15	82	56	15
Camp Perry	37, 39	41	31	30	82	51	15
Toledo	37, 39	41	42	30	83	15	30
Michigan:							
Monroe	37, 39, 376	41	56	15	83	14	30
Enrico Fermi Atomic Power Plant	37, 39	41	57	30	83	14	15
DETROIT RIVER							
Michigan:							
Wyandotte[1]	41, 412	42	12	15	83	27	15
Wayne County Water Authority[1]	41, 412	42	13	30	83	27	15
Detroit[1]	41, 416	42	21	30	83	27	15
LAKE ST. CLAIR							
Michigan:							
Grosse Pointe Farms	42, 416	42	24	15	82	53	45
Mount Clemens	42	42	36	30	82	43	30
New Baltimore	42	42	40	30	82	44	30
Ira Township	42	42	48	30	82	36	30
ST. CLAIR RIVER							
Michigan:							
The Old Club	42, 43	42	32	15	82	30	45
The Colony[1]	42, 43	42	27	15	82	31	45
Algonac[1]	42, 43	42	37	45	82	32	30
Marine City[1]	43	42	43	45	82	29	45
East China Township[1]	43	42	46	30	82	28	45
St. Clair[1]	43	42	49	30	82	29	30
Marysville[1]	43	42	54	30	82	29	30
Port Huron[1]	43, 51	42	58	30	82	25	30

See footnotes at end of table.

APPENDIX B (Page 1)

Source, State, and consumer served	Intake location by U.S. Lake Survey Chart Number	Intake location by geographical coordinates					
		North Latitude			West Longitude		
		Deg.	Min.	Sec.	Deg.	Min.	Sec.
LAKE HURON							
Michigan:							
Harbor Beach	51	43	51	30	82	38	45
Port Hope	51	43	56	45	82	42	00
Point aux Barques	52	44	04	15	82	55	30
Bay City	52, 524	43	43	02	83	54	05
Saginaw-Midland	52	44	06	30	83	31	45
Pinconning	52	43	51	25	83	54	10
Alabaster	52	44	11	35	83	23	15
East Tawas	52	44	16	40	83	29	30
Alpena	53	45	02	40	83	25	30
Stoneport	6, 53, 537	45	17	55	83	25	05
St. Ignace	6, 60, 70	45	49	45	84	42	25
Mackinac Island	6, 60, 70	45	50	50	84	37	35
LAKE MICHIGAN							
Michigan:							
Traverse City	70, 706	44	46	20	85	37	30
Ludington	77	43	58	45	86	28	30
Muskegon	76, 767	43	12	25	86	21	05
Muskegon Heights	76	43	10	50	86	19	05
Grand Haven	76, 765	43	03	00	86	14	45
Grand Rapids	76	42	58	15	86	14	45
Holland	76, 763	42	46	00	86	13	40
South Haven	76	42	24	00	86	17	40
Benton Harbor	75, 758	42	07	50	86	29	10
St. Joseph	75, 758	42	06	50	86	30	10
Bridgman	75	41	56	35	86	35	05
Menominee	702, 723	45	06	40	87	35	35
Escanaba	70, 701, 718	45	44	35	87	02	15
Gladstone	70, 701, 718	45	50	40	86	59	35
Nahma	70, 701	45	50	00	86	39	40
Indiana:							
Long Beach	75	41	45	00	86	51	35
Michigan City	75	41	44	10	86	54	10
Gary	75, 751	41	38	35	87	20	40
East Chicago	75, 751	41	39	50	87	24	25
Whiting	75, 751, 755	41	40	50	87	25	25
Hammond	75, 751, 755	41	42	15	87	30	30
Illinois:							
Chicago: (a) 68th St. crib [1]	75, 751	41	47	10	87	31	35
(b) Four Mile crib [2]	75, 751	41	52	50	87	33	45
(c) Harrison crib [1]	75, 751, 752	41	55	00	87	34	30
(d) Wilson Ave. crib [2]	75, 751	41	58	00	87	35	30
Evanston	75, 751	42	03	45	87	39	15
Wilmette	75	42	05	15	87	41	00
Kenilworth	75	42	06	00	87	42	10
Winnetka	75	42	07	15	87	43	20
Glencoe	75	42	08	45	87	44	30
Highland Park	75	42	11	45	87	46	55
Highwood	75	42	12	30	87	47	25
Fort Sheridan	75	42	13	40	87	47	40
Lake Forest	75	42	16	15	87	48	50
Great Lakes Naval Training Center	75	42	18	50	87	48	05
North Chicago	75	42	19	25	87	48	45
Waukegan	74, 75	42	21	30	87	48	25
Wisconsin:							
Kenosha	74	42	35	45	87	47	55
Racine	74, 745	42	44	45	87	45	30
Oak Creek	74	42	52	45	87	50	50
Carrollville	74	42	53	00	87	50	00
South Milwaukee	74	42	54	05	87	50	15
Cudahy	74	42	57	20	87	50	00
Milwaukee: (a) North intake	74	43	04	55	87	53	30
(b) South intake	74	43	00	10	87	51	15
Whitefish Bay	74	43	08	10	87	53	00
Port Washington	74	43	23	30	87	51	50
Sheboygan	73	43	46	35	87	41	10
Manitowoc	73, 735	44	04	44	87	38	55
Two Rivers	73	44	07	55	87	33	25
Green Bay	70, 73, 703	44	30	15	87	27	35
Marinette	702, 723	45	05	00	87	38	50
LAKE SUPERIOR							
Michigan:							
White Pine	95	46	50	10	89	34	15
Calumet	94	47	16	45	88	32	10
Copper Harbor	94	47	28	25	87	53	20
Baraga	94, 943	46	46	40	88	30	20
L'Anse	94, 943	46	45	45	88	27	20
Marquette	93, 935	46	32	45	87	21	55
Munising	93, 931	46	26	40	86	40	50
Sault Ste. Marie [1]	63, 92	46	29	30	84	25	30
Wisconsin:							
Ashland	96, 961, 964	46	36	20	90	52	30
Washburn	96, 961, 964	46	40	25	90	52	20
Superior	96, 966	46	43	05	92	02	45
Minnesota:							
Duluth	96	46	51	40	91	57	30
Two Harbors	96	47	01	10	91	38	25
Beaver Bay	96, 97	47	15	10	91	15	50
Silver Bay	97	47	17	50	91	14	25
Grand Marais	97	47	44	40	90	20	45

[1] Restricted area extends from three miles upstream to one-half mile downstream of the intake.
[2] Restricted area is a circle having a radius of four miles around this intake.

[F.R. Doc. 60-8578; Filed, Sept. 15, 1960; 8:45 a.m.]

APPENDIX B (Page 2)

LAKE CARRIERS' ASSN. ET AL *v.* MacMULLAN ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

No. 71–422. Argued March 22–23, 1972—Decided May 30, 1972

Michigan's Watercraft Pollution Control Act of 1970, appellees maintain, prohibits the discharge of sewage, whether treated or untreated, in Michigan waters and requires vessels with marine toilets to have sewage storage devices. Appellants, the Lake Carriers' Association and members owning or operating Great Lakes bulk cargo vessels, filed a complaint for declaratory and injunctive relief, contending that the Act unduly burdens interstate and foreign commerce; contravenes uniform maritime law; violates due process and equal protection requirements; and is invalid under the Supremacy Clause primarily because of conflict with or pre-emption by the Federal Water Pollution Control Act, as amended by the Water Quality Improvement Act of 1970. That law appears to contemplate sewage control after appropriate federal standards have been issued through on-board treatment before disposal in navigable waters, unless the Administrator of the Environmental Protection Agency provides on special application for a complete prohibition on discharge in designated areas. A three-judge District Court dismissed the complaint for lack of a justiciable controversy. The court also found "compelling reasons to abstain from consideraton of the matter in its present posture"—the attitude of the Michigan authorities, who are not threatening criminal prosecution but are seeking industry cooperation; the availabilty of declaratory relief in the Michigan courts; the possibility of a complete prohibition on the discharge of sewage in Michigan's navigable waters under federal law; the absence of existing conflict between the Michigan requirements and other state laws; and the publication of proposed federal standards that Michigan might consider in interpreting and enforcing its law. *Held:*

1. The complaint presents an "actual controversy" within the meaning of the Declaratory Judgment Act because the obligation to install sewage storage devices under the Michigan statute is presently effective in fact. Pp. 506–508.

2. Abstention is permissible "only in narrowly limited 'special circumstances,'" *Zwickler* v. *Koota*, 389 U. S. 241, 248 (1967), justifying "the delay and expense to which application of the abstention doctrine inevitably gives rise." *England* v. *Medical Examiners*, 375 U. S. 411, 418 (1964). Those circumstances do not include the majority of grounds given by the District Court. Pp. 509–510.

(a) The absence of an immediate threat of prosecution is not a reason for abstention. In the absence of a pending state proceeding exercise of federal court jurisdiction ordinarily is appropriate if the conditions for declaratory or injunctive relief are met. *Younger* v. *Harris*, 401 U. S. 37 (1971), and *Samuels* v. *Mackell*, 401 U. S. 66 (1971), distinguished. Pp. 509–510.

(b) The availability of declaratory relief in state courts on federal claims is not a reason for abstention. *Zwickler* v. *Koota*, *supra*, at 248. P. 510.

(c) Just as the possibility of a complete prohibition on the discharge of sewage in Michigan's navigable waters under federal law and the asserted absence of existing conflict between the Michigan requirements and other state laws do not diminish the immediacy and reality of appellants' grievance, they do not call for abstention. Pp. 510.

3. The Michigan statute, however, is unclear in particulars that go to the foundation of appellants' grievance and has not yet been construed by any Michigan court. In this circumstance abstention was appropriate because authoritative resolution of those ambiguities in the state courts is sufficiently likely to "avoid or modify the [federal] constitutional [questions]," *Zwickler* v. *Koota*, *supra*, at 249, appellants raise to warrant abstention, particularly in view of the absence of countervailing considerations found compelling in prior decisions. Pp. 510–513.

336 F. Supp. 248, vacated and remanded.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, STEWART, WHITE, and MARSHALL, JJ., joined. BLACKMUN, J., filed a statement concurring in the result, in which REHNQUIST, J., joined, *post*, p. 513. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 513.

Scott H. Elder argued the cause for appellants. With him on the briefs was *John A. Hamilton*.

Robert A. Derengoski, Solicitor General of Michigan, argued the cause for appellees. With him on the brief were *Frank J. Kelley,* Attorney General, and *Jerome Maslowski* and *Francis J. Carrier,* Assistant Attorneys General.

Briefs of *amici curiae* urging reversal were filed by *Robert A. Jenkins* and *Fenton F. Harrison* for the Dominion Marine Assn., and by *Nicholas J. Healy* and *Gordon W. Paulsen* for Assuranceforeningen Gard et al.

Louis J. Lefkowitz, Attorney General, *pro se, Samuel A. Hirshowitz,* First Assistant Attorney General, and *Thomas F. Harrison* and *Philip Weinberg,* Assistant Attorneys General, filed a brief for the Attorney General of New York as *amicus curiae* urging affirmance.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This is an appeal from the judgment of a three-judge District Court, convened under 28 U. S. C. §§ 2281, 2284, dismissing a complaint to have the Michigan Watercraft Pollution Control Act of 1970, Mich. Comp. Laws Ann. § 323.331 *et seq.* (Supp. 1971), declared invalid and its enforcement enjoined. 336 F. Supp. 248 (1971). We noted probable jurisdiction, 404 U. S. 982 (1971), and affirm the District Court's determination to abstain from decision pending state court proceedings.

The Michigan statute, effective January 1, 1971, provides in pertinent part:

> "Sec. 3. (1) A person [defined in § 2 (i) to mean "an individual, partnership, firm, corporation, association or other entity."] shall not place, throw, deposit, discharge or cause to be discharged into or onto the waters of this state, any . . . sewage [defined in § 2 (d) to mean "all human body wastes, treated or untreated"] . . . or other liquid or solid materials

which render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes.

"(2) It is unlawful to discharge, dump, throw or deposit . . . sewage . . . from a recreational, domestic or foreign watercraft used for pleasure or for the purpose of carrying passengers, cargo or otherwise engaged in commerce on the waters of this state.

"Sec. 4. (1) Any pleasure or recreational watercraft operated on the waters of this state which is moored or registered in another state or jurisdiction, if equipped with a pollution control device approved by that jurisdiction, may be approved by the [State Water Resources Commission of the Department of Natural Resources] to operate on the waters of this state.

"(2) A person owning, operating or otherwise concerned in the operation, navigation or management of a watercraft [defined in § 2 (g) to include "foreign and domestic vessels engaged in commerce upon the waters of this state" as well as "privately owned recreational watercraft"] having a marine toilet shall not own, use or permit the use of such toilet on the waters of this state unless the toilet is equipped with 1 of the following pollution control devices:

"(a) A holding tank or self-contained marine toilet which will retain all sewage produced on the watercraft for subsequent disposal at approved dockside or onshore collection and treatment facilities.

"(b) An incinerating device which will reduce to ash all sewage produced on the watercraft. The ash shall be disposed of onshore in a manner which will preclude pollution.

"Sec. 8. . . . Commercial docks and wharfs designed for receiving and loading cargo and/or freight from commercial watercraft must furnish facilities, if determined necessary, as prescribed by the commission, to accommodate discharge of sewage from heads and galleys . . . . [of] the watercraft which utilize the docks or wharfs.

. . . . . .

"Sec. 10. The commission may promulgate all rules necessary or convenient for the carrying out of duties and powers conferred by this act.

"Sec. 11. Any person who violates any provision of this act is guilty of a misdemeanor and shall be fined not more than $500.00. To be enforceable, the provision or the rule shall be of such flexibility that a watercraft owner, in carrying out the provision or rule, is able to maintain maritime safety requirements and comply with the federal marine and navigation laws and regulations."

Appellees—the State Attorney General, the Department of Natural Resources and its Director, and the Water Resources Commission and its Executive Secretary—read these provisions as prohibiting the discharge of sewage, whether treated or untreated, in Michigan waters and as requiring vessels with marine toilets to have sewage storage devices.

Appellants—the Lake Carriers' Association and individual members who own or operate federally enrolled and licensed Great Lakes bulk cargo vessels—challenge the Michigan law on a variety of grounds. They urge that the Michigan law is beyond the State's police power and places an undue burden on interstate and foreign commerce, impermissibly interferes with uniform maritime law, denies them due process and equal protection of the laws, and is unconstitutionally vague. They also contend that the Michigan statute conflicts with or is

pre-empted by federal law, primarily [1] the Federal Water Pollution Control Act, as amended by the Water Quality Improvement Act of 1970, and is therefore invalid under the Supremacy Clause. Under the Water Quality Improvement Act, the Administrator of the Environmental Protection Agency [2] is directed "[a]s soon as possible, after April 3, 1970, . . . [to] promulgate Federal standards of performance for marine sanitation devices . . . which shall be designed to prevent the discharge of untreated or inadequately treated sewage into or upon the navigable waters of the United States from new vessels and existing vessels, except vessels not equipped with installed toilet facilities." 84 Stat. 100, 33 U. S. C. § 1163 (b)(1).[3] These standards, which as of now are not issued,[4] are to become effective for new vessels two years after promulgation and for existing vessels five years after promulgation. 84 Stat. 101, 33 U. S. C. § 1163 (c)(1). Thereafter, "no State . . . shall adopt or enforce any statute or regulation . . . with respect to the

[1] Appellants also contend that the Michigan law is pre-empted by the Steamboat Inspection Acts of Feb. 28, 1871, 16 Stat. 440, and of May 27, 1936, 49 Stat. 1380, as amended, 46 U. S. C. § 361 *et seq.* an *amicus curiae*, moreover, presses the contention, suggested in appellants' complaint, that the Michigan law conflicts with the United States-Canadian Boundary Waters Treaty of 1909, 36 Stat. 2448, as well as enters into the domain of foreign affairs constitutionally reserved to the National Government. See Brief of Dominion Marine Association *amicus curiae*.

[2] The authority to administer the Water Quality Improvement Act, originally lodged in the Secretary of the Interior, was transferred to the Administrator of the Environmental Protection Agency by Reorganization Plan No. 3 of 1970, set out in the Appendix to Title 5 of the United States Code.

[3] "Sewage" is defined under the Act to mean "human body wastes and the wastes from toilets and other receptacles intended to receive or retain body wastes." 84 Stat. 100, 33 U. S. C. § 1163 (a)(6).

[4] A notice of proposed standards was, however, published on May 12, 1971. See 36 Fed. Reg. 8739.

design, manufacture, or installation or use of any marine sanitation device on any vessel subject to the provisions of this section." *Id.*, § 1163 (f). However, "[u]pon application by a State, and where the Administrator determines that any applicable water quality standards require such a prohibition, he shall by regulation completely prohibit the discharge from a vessel of any sewage (whether treated or not) into those waters of such State which are the subject of the application and to which such standards apply." *Ibid.* Thus, the federal law appears to contemplate sewage control through onboard treatment before disposal in navigable waters, unless the Administrator provides on special application for a complete prohibition on discharge in designated areas.

The District Court below did not reach the merits of appellants' complaint on the ground that "the lack of a justiciable controversy precludes entry of this Court into the matter." 336 F. Supp., at 253.[5] "An overview of the factual situation presented by the evidence in this case," said the District Court, "compels but one conclusion: that the plaintiffs here are seeking an advisory

[5] The District Court also noted that "[w]ith regard to pre-emption, the Supreme Court in Swift & Co. v. Wickham, 382 U. S. 111 [1965], held that Supremacy Clause cases are not within the purview of a three judge court." 336 F. Supp., at 253. Appellants correctly point out that in reinstating that rule, *Wickham* made clear that a three-judge court is the proper forum for all claims against the challenged statute so long as there is a nonfrivolous constitutional claim that constitutes a justiciable controversy and warrants, on allegations of irreparable harm, consideration for injunctive relief. See 382 U. S., at 122 n. 17, 125. Indeed, that was the explicit holding in *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U. S. 73, 80–81 (1960), re-affirming prior cases. It is clear that appellants' complaint satisfies this test if the constitutional issues raised are justiciable controversies. Since we hold, *infra*, that they are, three-judge court jurisdiction exists over all of appellants' claims, including the Supremacy Clause issues.

opinion . . . ." *Ibid.* The District Court also found "compelling reasons to abstain from consideration of the matter in its present posture," *ibid.*—namely, "the attitude of Michigan authorities who seek the cooperation of the industry in the implementation of its program and have not instigated, nor does it appear, threatened criminal prosecutions," *id.*, at 252;[6] the availability of declaratory relief in Michigan courts; the possibility of a complete prohibition on the discharge of sewage in Michigan's navigable waters under federal law;[7] the absence of existing conflict between the Michigan requirements and other state laws;[8] and the pub-

[6] The Michigan authorities have so far generally refrained from prosecution because adequate land-based pump-out facilities are not yet available to service vessels equipped with sewage storage devices. See *infra*, at 8–9. After oral argument here, the Solicitor General of Michigan informed us "that local officials in Cheboygan County, Michigan, have 'ticketed' a Coast Guard Captain for discharging sewage into the waters of the Great Lakes." However, "to assure the Court that Michigan will not depart from the representations it has made to the Court," the Solicitor General stated that he is "taking immediate steps to quash the charge or have the local court stay its hand until" the decision here.

[7] Michigan has filed an application with the Administrator of the Environmental Protection Agency for a prohibition under 33 U. S. C. § 1163 (f) on the discharge of any sewage, treated or untreated, into all of the State's waters subject to the Water Quality Improvement Act. The Administrator has indicated that any no-discharge regulation issued will not become effective before the effective date of the initial standards promulgated under § 1163 (b) (1). See 36 Fed. Reg. 8739–8740. Appellants argue that the Administrator's authority to issue no-discharge regulations is narrow and could not encompass a complete prohibition on discharge throughout Michigan's navigable waters. Since we find, *infra*, that the possibility of such a prohibition is immaterial to the issues answered here, we need not now decide this question.

[8] Appellants contend in this regard that the laws of other States dealing with the discharge of sewage are critically different from the Michigan statute in various respects. This question, too, we need

lication of proposed federal standards that might be considered by Michigan in the interpretation and enforcement of its statute.[9]

Appellants now urge that their complaint does present an "actual controversy" within the meaning of the Declaratory Judgment Act, 28 U. S. C. § 2201, that is ripe for decision. We agree. The test to be applied, of course, is the familiar one stated in *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 273 (1941): "Basically, the question in each case is whether . . . there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Compare, *e. g.*, *ibid.*, with, *e. g.*, *Golden* v. *Zwickler*, 394 U. S. 103 (1969). Since, as appellees concede,[10] the Michigan requirements on the discharge of sewage will be preempted when the federal standards become effective, the gist of appellants' grievance is that, according to Michigan authorities, they are required under Michigan law to install sewage storage devices that (1) may become unnecessary once federal standards, authorizing discharge of treated sewage, become applicable or (2) may, in any event, conflict with other state regulations pending the promulgation and effective date of the federal

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not address, since we find, *infra*, that the presence or absence of conflicting state requirements is irrelevant.

[9] See n. 4, *supra*.

[10] Although appellees took an equivocal position on this question in oral argument here, see Tr. of Oral Arg. 36–39, the District Court below expressly found such a concession, see 336 F. Supp., at 255, and appellees repeated the concession in opposing appellants' jurisdictional statement. See Brief in Support of Motion to Dismiss or Affirm 11. In any event, the terms of the Water Quality Improvement Act are clear that pre-emption occurs at least when the initial federal standards promulgated under the Act become effective. See 33 U. S. C. § 1163 (f), quoted in part, *supra*, at 4. See also 36 Fed. Reg. 8739–8740.

standards. The immediacy and reality of appellants' concerns do not depend, contrary to what the District Court may have considered, on the probability that federal standards will authorize discharge of treated sewage in Michigan waters or that other States will implement sewage control requirements inconsistent with those of Michigan. They depend instead only on the present effectiveness in fact of the obligation under the Michigan statute to install sewage storage devices. For if appellants are now under such an obligation, that in and of itself makes their attack on the validity of the law a live controversy, and not an attempt to obtain an advisory opinion. See, *e. g., Southern Pacific Co.* v. *Arizona,* 325 U. S. 761 (1945) (existing burden on interstate commerce justiciable controversy in absence of federal pre-emption or other conflicting state laws).

Regarding the present effectiveness in fact of a statutory obligation, the plurality opinion in *Poe* v. *Ullman,* 367 U. S. 497, 508 (1961), stated that a justiciable controversy does not exist where "compliance with [challenged] statutes is uncoerced by the risk of their enforcement." That, however, is not this case. Although appellees have indicated that they will not prosecute under the Michigan act until adequate land-based pump-out facilities are available to service vessels equipped with sewage storage devices, they *have* sought on the basis of the act, and the threat of future enforcement to obtain compliance as soon as possible. The following colloquy that occurred on oral argument here is instructive, Tr. of Oral Arg. 34–35:

> "[Appellees]: . . . . We urge that the leadtime for the construction or erection of pump-out facilities is necessary, and there would be no enforcement until pump-out facilities were available.

"Q. But you're insisting that the carriers get ready to comply and——

"[Appellees]: Yes, sir.

"Q. —because if you wait until pump-out stations are ready to begin [servicing] tanks, then there will be another great delay?

"[Appellees]: Oh, yes, sir.

"Q. So you have a rather concrete confrontation with these carriers now, don't you?

"[Appellees]: Yes, sir, we do. . . ."

Thus, if appellants are to avoid prosecution, they must be prepared, according to Michigan authorities, to retain all sewage on board as soon as pump-out facilities are available, which, in turn, means that they must promptly install sewage storage devices.[11] In this circumstance, compliance is coerced by the threat of enforcement, and the controversy is both immediate and real. See, *e. g.*, *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *City of Altus, Oklahoma* v. *Carr*, 255 F. Supp. 828, aff'd *per curiam*, 385 U. S. 35 (1966). See generally, *e. g.*, Comment, 62 Col. L. Rev. 106 (1962).[12]

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[11] Appellees stressed in oral argument here that "[t]he provision for pump-out facilities is no great mechanical accomplishment." Tr. of Oral Arg. 35. This only reinforces the conclusion that appellants must, according to Michigan authorities, quickly get into a position to comply with the Michigan statute.

[12] In coming to a contrary conclusion, the District Court relied heavily on *Public Serv. Comm'n* v. *Wycoff Co.*, 344 U. S. 237 (1952), where we held that declaratory relief was inappropriate in behalf of a carrier seeking a determination that its intrastate transportation constituted interstate commerce. The District Court's reliance on that decision was misplaced. As the Court said in *California Comm'n* v. *United States*, 355 U. S. 534, 538–539 (1958), *Wycoff Co.* was a case "where a carrier sought relief in a federal court against a state commission in order 'to guard against the possibility,' [344 U. S.], at 244, that the Commission would assume jurisdiction." Here, as in *California Comm'n*, the confrontation between the parties

Appellants next argue that the District Court erred in abstaining from deciding the merits of their complaint.[13] We agree that abstention was not proper on the majority of grounds given by the District Court, but hold that abstention was, nevertheless, appropriate for another reason suggested but not fully articulated in its opinion. Abstention is a "judge-made doctrine . . . , first fashioned in 1941 in *Railroad Commission v. Pullman Co.*, 312 U. S. 496, [that] sanctions . . . escape [from immediate decision] only in narrowly limited 'special circumstances,' *Propper* v. *Clark*, 337 U. S. 472, 492," *Zwickler* v. *Koota*, 389 U. S. 241, 248 (1967), justifying "the delay and expense to which application of the abstention doctrine inevitably gives rise." *England* v. *Medical Examiners*, 375 U. S. 411, 418 (1964). The majority of circumstances relied on by the District Court in this case do not fall within that category. First, the absence of an immediate threat of prosecution does not argue against reaching the merits of appellants' complaint. In *Younger* v. *Harris*, 401 U. S. 37 (1971), and *Samuels* v. *Mackell*, 401 U. S. 66 (1971), this Court held that, apart from "extraordinary circumstances," a federal court may not enjoin a pending state prosecution or declare invalid the statute under which the prosecution was brought. The decisions there were premised on considerations of equity practice and comity in our federal system that have little force in the absence of a pending state proceeding. In that circumstance, exercise of federal court jurisdiction ordinarily is appropriate if the conditions for declaratory or injunctive relief are met. See generally

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has already arisen, and "[t]he controversy is present and concrete . . . ." 355 U. S., at 539.

[13] The question of abstention, of course, is entirely separate from the question of granting declaratory or injunctive relief. See generally *Golden* v. *Zwickler*, 394 U. S. 103 (1969); *Zwickler* v. *Koota*, 389 U. S. 241 (1967).

Perez v. *Ledesma*, 401 U. S. 82, 93 (1971) (separate opinion).

Similarly, the availability of declaratory relief in Michigan courts on appellants' federal claims is wholly beside the point. In *Zwickler* v. *Koota*, *supra*, at 248, we said:

> "In thus [establishing jurisdiction for the exercise of] federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts, '. . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . . ,' *Robb* v. *Connolly*, 111 U. S. 624, 637." Compare, *e. g.*, *Askew* v. *Hargrave*, 401 U. S. 476 (1971).

The possibility that the Administrator of the Environmental Protection Agency may upon Michigan's application forbid the discharge of even treated sewage in state waters and the asserted absence of present conflict between the Michigan requirements and other state laws are equally immaterial. Just as they do not diminish the immediacy and reality of appellants' grievance, they do not call for abstention.

The last factor relied on by the District Court—the publication of proposed federal standards that might be considered by Michigan in the interpretation and enforcement of its statute—does, however, point toward considerations that fall within the "special circumstances" permitting abstention. The paradigm case for abstention arises when the challenged state statute is susceptible of "a construction by the state courts that would avoid or modify the [federal] constitutional question. *Harrison*

v. *NAACP*, 360 U. S. 167. Compare *Baggett* v. *Bullitt*, 377 U. S. 360." *Zwickler* v. *Koota*, *supra*, at 249. More fully, we have explained:

> "Where resolution of the federal constitutional question is dependent upon, or may be materially altered by, the determination of an uncertain issue of state law, abstention may be proper in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication. . . . The doctrine . . . contemplates that deference to state court adjudication only be made where the issue of state law is uncertain." *Harman* v. *Forssenius*, 380 U. S. 528, 534 (1965).

That is precisely the circumstance presented here. The Michigan Watercraft Pollution Control Act of 1970 has not been construed in any Michigan court, and, as appellants themselves suggest in attacking it for vagueness, its terms are far from clear in particulars that go to the foundation of their grievance. It is indeed only an assertion by appellees that the Michigan law proscribes the discharge of even treated sewage in state waters. Section 3 (2) of the Act does state that "[i]t is unlawful to discharge . . . sewage . . . from a recreational, domestic or foreign watercraft used for pleasure or for [commerce] . . . ," and § 4 (2) does require vessels equipped with toilet facilities to have sewage storage devices.[14] Yet § 3 (1) seemingly contemplates the dis-

[14] We assume that these provisions apply to commercial watercraft, though even this is not textually clear. Section 3 (2) in terms applies only to "recreational" vessels, while § 4 (2)—despite the expansive definition of "watercraft" in § 2 (g)—could be similarly limited in light of § 4 (1), which governs only "pleasure or recreational watercraft."

charge of treated sewage by merely prohibiting any person from emitting sewage "which [renders] the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes." Moreover, § 11 provides that "[t]o be enforceable, the provision [of the Act] or the rule [presumably promulgated thereunder] shall be of such flexibility that a watercraft owner, in carrying out the provision or rule, is able to maintain maritime safety requirements and comply with the federal marine and navigation laws and regulations." Michigan has thus demonstrated concern that its pollution control requirements be sufficiently flexible to accord with federal law. We do not know, of course, how far Michigan courts will go in interpreting the requirements of the state Watercraft Pollution Control Act in light of the federal Water Quality Improvement Act[15] and the constraints of the United States Constitution.[16] But we are satisfied that authoritative resolution of the ambiguities in the Michigan law is sufficiently likely to avoid or significantly modify the federal questions appellants raise to warrant abstention, particularly in view of the absence of countervailing considerations that we have found compelling in prior decisions. See, *e. g.*, *Harman* v. *Forssenius*, *supra*, at 537; *Baggett* v. *Bullitt*, 377 U. S. 360, 378–379 (1964).

In affirming the decision of the District Court to abstain, we, of course, intimate no view on the merits of appellants' claims. We do, however, vacate the judgment below and remand the case to the District Court

[15] The Michigan courts may also see fit to interpret the Michigan statute in light of the other Supremacy Clause arguments that have have been made in this case. See n. 1, *supra*.

[16] In the latter regard, see, *e. g.*, *Government Employees* v. *Windsor*, 353 U. S. 364 (1957).

with directions to retain jurisdiction pending institution by appellants of appropriate proceedings in Michigan courts. See *Zwickler* v. *Koota*, 389 U. S., at 244 n. 4.

It is so ordered.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE REHNQUIST joins, concurring in the result.

I agree that the complaint presents an actual controversy and that the District Court properly abstained. I therefore concur in the result and join the judgment of the Court.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE joins, dissenting.

The three-judge court below assigned two grounds for dismissing appellants' complaint: (i) there was no justiciable controversy warranting a declaratory judgment; and (ii) this was an appropriate case for abstention by the federal courts until the Michigan Act is construed by its courts. 336 F. Supp. 248 (1971). This Court today affirms the decision of the court below to abstain, despite rejecting virtually all of the premises upon which it was based.

The opinion of this Court concludes, contrary to the holding below, that the controversy is justiciable and that a case for declaratory judgment relief was stated. The Court also concluded that "abstention was not proper on the majority of grounds given by the District Court." Nevertheless, and despite general disagreement with the trial court on the major issues, its decision to abstain is now affirmed.

As it seems to me that the central thrust of the Court's reasoning (with which I agree) requires reversal rather than affirmance of this decision, I file this dissent.

There is indeed a serious present controversy, involving important federal issues, and posing for the Lake Carriers an immediate choice between the possibility of criminal prosecution or the expenditure of substantial sums of money for antipollution devices and equipment which may not be compatible with the federal regulations which admittedly in due time will be pre-emptive. This presents a classic case for declaratory relief, 28 U. S. C. § 2201, *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 273 (1941). As the opinion of the Court states, "compliance [with the Michigan law] is coerced by the threat of enforcement, and the controversy is both immediate and real."

On the second question, that of abstention, the Court finally finds a ground in the possibility that the state courts of Michigan may construe the statute in a way that will avoid the federal questions. But this is a slender reed on which to rest a judgment. The Michigan statute is not ambiguous on the issue which appellants deem the most critical, namely, whether they are required under Michigan law to install at considerable expense sewage storage devices that may become unnecessary when federal standards become applicable. Section 4 (2) of the Michigan Act is unequivocal, providing that vessels may not use marine toilets in Michigan waters unless equipped with:

> "(a) A holding tank or self-contained marine toilet which will retain all sewage produced on the watercraft for subsequent disposal at approved dockside or onshore collection and treatment facilities.
>
> "(b) An incinerating device which will reduce to ash all sewage produced on the watercraft. The ash shall be disposed of onshore in a manner which will preclude pollution."

Section 3 (2) flatly prohibits the discharge of sewage into Michigan waters.[1] These two sections unmistakably express Michigan's decision in favor of retention or incineration of sewage aboard ships rather than its treatment and discharge into state waters.[2]

The majority opinion of the Court views § 3 (1) as affording some flexibility and room for interpretation.[3] Yet, it seems clear from the context of the entire statute that § 3 (1) is a general statement of environmental purpose applicable to all persons (as defined), expressing the overall statutory objective of prohibiting pollution of Michigan waters. This section can hardly be construed to contradict the specific provisions of § 4 (2) which relate to the owners and operators of foreign and domestic vessels engaged in commerce upon Michigan waters. Indeed, the Michigan State Attorney General, the Department of Natural Resources and its Director, and the Water Resources Commission and its Executive Secretary *all* read the statute as "designed to prevent appellants and others in their class from pouring their

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[1] "It is unlawful to discharge, dump, throw or deposit garbage, litter, sewage or oil from a recreational, domestic or foreign watercraft used for pleasure or for the purpose of carrying passengers, cargo or otherwise engaged in commerce on the waters of this state." State of Michigan Act 167, Public Acts of 1970, § 3 (2).

[2] By defining "sewage" in § 2 (d) of the Act to mean all human body wastes, *treated or untreated* (emphasis supplied), Michigan further precludes any possibility that discharge of treated sewage would be permitted.

[3] "A person shall not place, throw, deposit, discharge or cause to be discharged into or onto the waters of this state, any litter, sewage, oil or other liquid or solid materials which render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes." State of Michigan Act 167, Public Acts of 1970, § 3 (1).

filth, *no matter how well treated,* into Michigan waters of the Great Lakes." (Emphasis supplied.) Appellees' Brief 16.[4]

Appellants have raised federal questions (as to the merits of which no opinion is expressed) which are important to the public as well as to the litigants. They have sought relief in a federal court, relying on "the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims." *Zwickler* v. *Koota,* 389 U. S. 241, 248 (1967). It seems probable that these federal questions will remain in their present posture, whatever interpretation may be placed upon the Michigan statute by a state court. The questions of congressional intent to preempt the regulation of marine sanitation devices and of multiple state regulatory schemes which may unduly burden interstate commerce are, in large measure, independent of the particular construction given the Michigan Act.

We have spoken previously of "the delay and expense to which application of the abstention doctrine inevitably gives rise." *England* v. *Medical Examiners,* 375 U. S. 411, 418 (1964). The relegation to state courts of this important litigation, involving major federal

[4] Nor do I agree with the majority that § 11 of the Michigan Act affords a reason for abstention. Section 11 provides that any provision or rule under the Act "shall be of such flexibility that a watercraft owner . . . is able to maintain maritime safety requirements and comply with the federal marine and navigation laws and regulations." This language appears to relate only to federal safety, marine, and navigation laws and regulations. It does not refer to the Federal Water Pollution Control Act or to federal laws relating to pollution. It is difficult to believe that this single sentence in § 11 of the Michigan Act could be construed to nullify the other affirmative provisions prohibiting altogether the discharge of sewage.

issues and affecting every ship operating in Michigan waters, is likely to result in serious delay, substantial expense to the parties (including the State), and a prolonging of the uncertainty which now exists.

I would reverse the judgment below and direct the District Court to proceed on the merits.